Supreme Court, U.S.
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No.

In the

Supreme Court of the United States

STEPHANIE BEKKER,

Petitioner,

versus

HUMANA HEALTH PLAN, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JEFFREY M. CAREY
Counsel of Record
Suite 3300
Ten S. LaSalle Street
Chicago, IL 60603
(312) 251-2340
Attorney for Petitioner

7 pp

QUESTION PRESENTED

I. WHICH PARTY BEARS THE BURDEN OF PROOF WHEN AN EMPLOYER SEEKS TO JUSTIFY THE IMPOSITION OF DISCRIMINATORY CONDITIONS OF EMPLOYMENT AS A BUSINESS NECESSITY UNDER THE "DIRECT THREAT" DEFENSE PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT?

II. WHEN AN EMPLOYER SEEKS TO JUSTIFY THE DISCHARGE OF AN EMPLOYEE UNDER THE "DIRECT THREAT" DEFENSE PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT, MUST THE EMPLOYER PRESENT COMPETENT MEDICAL EVIDENCE THAT THE EMPLOYEE'S MEDICAL CONDITION CONSTITUTES A DIRECT THREAT?

III. WHEN AN EMPLOYER SEEKS TO RELY ON THIRD PARTY PHYSICIAN'S OPINION REGARDING THE MEDICAL CONDITION OF AN EMPLOYEE TO JUSTIFY THE EMPLOYEE'S DISCHARGE UNDER THE "DIRECT THREAT" DEFENSE PROVISIONS OF THE AMERICANS WITH DISABILITIES ACT, IS THE EMPLOYEE ENTITLED TO CHALLENGE THE PHYSICIAN'S OPINION?

IV. UNDER THE AMERICANS WITH DISABILITIES ACT, MAY AN EMPLOYER WHO SUSPECTS THAT AN EMPLOYEE SUFFERS FROM A DISABLING MEDICAL CONDITION REQUIRE THE EMPLOYEE TO UNDERGO TREATMENT FOR THAT CONDITION WITHOUT FIRST ESTABLISHING THROUGH COMPETENT MEDICAL EVIDENCE A SPECIFIC TREATMENT PROGRAM AND THE MEDICAL NECESSITY OF TREATMENT PROGRAM?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 229 F.3d 662 (7th Cir. 2000). A copy of the Opinion is included in the Appendix at Appendix 1a-21a. The opinion of the district Court for the Northern District of Illinois is unpublished. A copy of the Opinion is included in the Appendix at Appendix 22a-53a.

JURISDICTION

The United States Court of Appeals for the Seventh Circuit issued its Opinion on September 27, 2000. Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc which the United States Court of Appeals denied on November 14, 2000. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. The Court's jurisdiction is invoked pursuant to 28 U.S.C. 1254(1) and 2106.

STATUTORY PROVISIONS INVOLVED

Americans With Disabilities Act, 42 U.S.C. ' 12113(a):

> It may be a defense to a charge of discrimination . . . that an alleged application of qualification standards . . . that screen out or tend to screen out or to otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required by this chapter.

* * *

Americans With Disabilities Act, 42 U.S.C. ' 12113(b):

> Qualification standards [may] include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

STATEMENT OF THE CASE[1]

Stephanie Bekker is a physician. (Decision at 2). She was employed as a physician by Humana Health Plans, Inc., or its predecessors in interest for over 13 years, until December 17, 1996, when her employment was involuntarily terminated. It is undisputed that Humana fired Dr. Bekker because she did not agree immediately to enter an undefined treatment program that Humana sought to impose on her because it suspected she might be an alcoholic.

During her employment by Humana, Dr. Bekker handled approximately 4,000 patient visits per year. Humana considered Dr. Bekker to be an above average physician. (Decision at 13).

Nonetheless, in November 1996, a patient claimed that she smelled alcohol on Bekker during an examination. (Decision at 4). Bekker denied consuming alcohol before or during working hours and offered to undergo daily testing under Humana's supervision to assure that she does not report to work under the influence of alcohol. Bekker even offered to pay for

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[1]Record references are to the district court's Memorandum Opinion and Order granting summary judgment "(Decision _)."

References to deposition testimony are simply "([name] dep. at)." Bound copies of all of the depositions are attached to Defendant's Local Rule 12(M) Statement of Facts which is found in Case No. 97 C 4643, Docket record document No. 24 in the underlying case.

the breathalyzer testing equipment of Humana's choice. (Decision at 4). Humana rejected Bekker's offer. (Decision at 4).

Humana conducted an investigation of Dr. Bekker in which it reviewed of all of its internal reports regarding the quality of Dr. Bekker's patient care, patient satisfaction surveys regarding Bekker, patient complaints regarding Bekker, Bekker's employment evaluations, and Bekker's productivity reports. Humana conceded that, in its investigation, it found no evidence that Bekker had consumed alcoholic beverages while at work or that she had ever been under the influence of alcohol while at work. (Decision at 6). Dr. Frances Thomas, who shared an office with Dr. Bekker and was her immediate superior stated that there was "no way" Bekker drank at work or before coming to work. (Thomas dep. at 54; Wozniak dep at 68). Thomas never saw any evidence that Bekker was impaired at work. (Decision at 7). Humana also found no evidence that the quality or quantity of Bekker's professional care was in any way substandard. (Decision at 7). As Humana's Vice-President/Medical Director, Dr. Ernest Weis, testified: "We had no evidence that any of Dr. Bekker's medical care was in any way not meeting the standards." (Weis dep. at 242).

In its investigation, Humana also learned that a handful of employees who worked with Bekker thought that they smelled what may have been alcohol on Dr. Bekker at various times, although they never observed her to have been impaired. (Decision at 5). As Humana itself admitted, however, the apparent smell of alcohol is subjective and is not a sufficient basis to conclude that Dr. Bekker was impaired or even that she had been drinking. (Decision at 12).

Despite its having found no evidence that Dr. Bekker had been impaired at work or that her professional performance was in any way diminished, Humana "suspected" that Bekker was an "alcoholic." Weis told Bekker that he believed she had a drinking problem and demanded that, among other things, she

agree to enter treatment immediately. (Decision at 8). Bekker agreed to submit to another clinical evaluation, but stated that she wished to take counsel before making any other decisions. (Decision at 9). Dr. Bekker made arrangements to see Dr. Paul Feldman for an evaluation. (Decision at 9). However, Humana intervened, and communicated to Feldman its desire that Bekker enter treatment. When Bekker arrived for her appointment with Feldman, he did not perform the clinical evaluation that had been requested. (Decision at 9). Instead, Feldman told Bekker that she should check herself into his residential treatment program immediately. (Decision at 9). Bekker declined admission saying she wanted to obtain counsel before making any decisions.

After Bekker left, Feldman contacted Humana by telephone and said that he couldn't tell whether Bekker had a drinking problem but that he wanted her to enter his program as an extension of the diagnostic process "so he could find out what was going on. If there's a problem, how bad it was, if there is one." (Decision at 9). Humana then decided to discharge Bekker and requested that Feldman provide a letter that could be used to "bring closure" with Bekker. (Dusek dep. at 175-76).

In his letter, Feldman wrote that he believes that Bekker "does not drink in the workplace," but that she drinks heavily at night and that sometimes the smell lingers into the morning. In direct contradiction of his oral report to Humana that he couldn't tell if Bekker had a drinking problem, Feldman wrote that he "believes" Bekker "meets criteria for alcohol abuse," but did not indicate the nature or severity of the abuse, nor did he provide the clinical underpinnings for his belief. Feldman wrote that he recommended that Dr. Bekker "refrain" from practicing medicine until she went through a treatment program, but did not describe either the treatment program or its medical necessity. (Decision at 10). Neither Feldman nor Humana told Dr. Bekker about Feldman's letter or its contents.

The day after receiving Feldman's letter, Humana discharged Dr. Bekker. Thereafter, Humana refused even to meet and discuss the situation with Dr. Bekker.

Weis, who made the decision to discharge Bekker, testified that he terminated Bekker's employment because he suspected she was an alcoholic and she would not agree to his demand that she immediately enter treatment. (Decision at 12; Weis dep. at 191, 233, 244, 265-66, 286). At no time did Weis or any other decisionmaker at Humana claim to have believed that Bekker had been impaired at work or to have discharged her for having been impaired at work. To the contrary, Weis admitted, unequivocally, that Bekker would not have been fired *but for* his belief that she was an alcoholic who required treatment:

> Q: Let me ask you that question. If Dr. Feldman had indicated that Dr. Bekker didn't need treatment, would she have come back to work?
>
> A: Yes, we would have allowed her to come back.

(Weis dep. at 249).

Bekker brought suit under the Americans With Disabilities Act, alleging that Humana discharged her because of her perceived disability, alcoholism and that Humana had unlawfully required her to undergo undefined treatment as a condition of continued employment. The district court granted summary judgment against Bekker on the ground that she was not qualified for her position because she was a direct threat to the health and safety of her patients. In doing so, the district court held that the burden of proof was on Dr. Bekker to establish that she was not a direct threat. The district court held that Humana was not required to produce medical evidence

specifying the nature or extent of Bekker's alleged alcoholism or of the treatment that Humana required. Finally, the district court held that Humana could rely on Dr. Feldman's letter and that Bekker could not challenge the medical validity of Feldman's opinions. Indeed, the district court specifically prohibited Dr. Bekker from taking discovery from Feldman regarding his opinion.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' erroneously placed the burden of proof on Dr. Bekker in contradiction to the statute, the EEOC Interpretive Guidance, the decisions of the other Circuit Courts.

Humana required that Dr. Bekker enter treatment solely because it perceived her to be an alcoholic and a direct threat. Under the ADA, Humana could impose this condition, which tends "to screen out or to otherwise deny a job or benefit" to Bekker because of her disability only if it is "shown to be job-related and consistent with business necessity." *See* 42 U.S.C. ' 12113(a).

The district court held that Humana did not bear the burden of proving that its requirement that Bekker enter treatment was consistent with business necessity," but rather that Dr. Bekker was required to prove she was not a direct threat. This holding, which was adopted by the Circuit Court, is inconsistent with the statute, the EEOC Interpretive Guidance, the decisions of the other Circuit Courts and this Court's decisions in *Arline* and *Bragdon*.

Under the ADA, an employer may defend an otherwise discriminatory condition on a disabled person's employment only if can establish that the condition is consistent with business necessity and that without the condition, the person's

employment would constitute a direct threat. The ADA provides specifically that "it may be a *defense* to a charge of discrimination . . . that an alleged application of [otherwise discriminatory] qualification standards . . . has been shown to be job-related and consistent with business necessity." 42 U.S.C. ' 12113(a) (emphasis added). "Qualification standards" may "include a requirement that an individual shall not pose a *direct threat* to the health or safety of other individuals in the workplace." 42 U.S.C. ' 12113(b). Thus, under the ADA, it is the employer's burden to prove that the conditions it imposes because an employee is perceived to be a direct threat are a business necessity.

This result is consistent with the ADA's legislative history. The House Report states:

> [i]f the applicant is otherwise qualified for the job, he or she cannot be disqualified on the basis of a physical or mental condition unless the employer can demonstrate that the applicant's disability poses a direct threat to others in the work place. . . . The plaintiff is not required to prove that he or she poses no risk.

(H.R. Rep. No. 101-485, pt. 3 at 46 (1990), 1990 U.S.C.C.A.N. at 469).

At least three Circuit Courts, the First, Fifth, and Tenth, have held that the employer bears the burden of proof when it raises the direct threat defense. See Rizzo v. Children's World Learning Centers, Inc. 173 F.3d 254, 259, 260 (5th Cir. 1999) ("Rizzo II") (when an employer imposes "safety requirements that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities," the burden is on "the employer to prove that the employee is, in fact, a direct threat"); Rizzo v. Children's World Learning Centers, Inc. 84 F.3d 758, 764 (5th Cir. 1996) (Rizzo I) (employer bears the

burden of proving that the employee is a direct threat); EEOC v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997) ("where a person who can perform all essential job functions nonetheless [allegedly] poses a risk to others" * * * "the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense on which the defendant would bear the burden"); Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1088 (10th Cir. 1997) (direct threat is affirmative defense).

Prior to the Circuit Court's decision in this case, only one Circuit Court, the Eleventh, had held that the employee bears the burden of proof on the direct threat defense. See Moses v. American Nonwovens, Inc., 97 F.3d 446, 447 (11th Cir. 1996). However, Moses was a per curiam opinion, in which the burden of proof issue was mentioned in dictum with no substantive discussion or analysis.

Finally, the Equal Employment Opportunity Commission has also taken the position that the burden of proving direct threat rests with the employer. See EEOC Interpretive Guidance to 29 C.F.R. ' 1630.15(b) and (c) ("an employer must demonstrate that the requirement, as applied to the individual, satisfies the 'direct threat' standard in ' 1630.2(r) in order to show that the requirement is job-related and consistent with business necessity"). The EEOC's position is entitled to deference.

The question who bears the burden of proof when an employer seeks to justify imposing discriminatory conditions of employment on disabled employees under the direct threat defense is a matter of fundamental importance in the interpretation and application of the ADA. This Court should take this opportunity to resolve the conflict between the Circuits and clarify that it is the employer who bears the burden of proving the direct threat defense under the ADA.

II. The decision of the Circuit Court conflicts with this Court's holding, in *Arline* and *Bragdon*.

The district court held that Humana was free to rely on Dr. Feldman's letter and that Dr. Bekker was not entitled to challenge Feldman's opinions. Indeed, the district court specifically prohibited Dr. Bekker even from taking discovery from Feldman. The district court also held that even if Humana could not rely on Feldman's letter, it was nonetheless not required to produce competent medical evidence to establish that Dr. Bekker's condition caused her to be a direct threat. The district court's decision, which the Circuit Court adopted, conflicts with this Courts holdings in *Arline* and *Bragdon*. *See School Bd. of Nassau County v. Arline*, 480 U.S. 273 (1987); *Bragdon v. Abbott*, 524 U.S. 624 (1998). In *Arline* and *Bragdon*, this Court held that, in determining whether an employee represents a direct threat, the courts must be based on "reasonable medical judgements given the state of medical knowledge" that take into account the nature of the risk, the duration of the risk, the severity of the risk and the probability that the risk will come to fruition. *See Arline*, 480 U.S. at 288; *See also Bragdon*, 524 U.S. at 648. These standards have been incorporated into the ADA and the regulations promulgated pursuant to it. *See* 29 C.F.R. ' 1630.2(r) ("The assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence"). The direct threat determination must no be based on "subjective perceptions, irrational fears, patronizing attitudes, or stereotypes about the nature or effect of a particular disability." Id.

In *Arline*, this Court specifically reserved the issue whether an employer could rely in good faith on a medical opinion in determining whether an employee is a direct threat. *See* 480 U.S. at 288, n. 18. In *Bragdon*, however, the Court

took up the issue of good faith reliance on medical opinions and held that a "defendant's belief that a significant risk existed, even if maintained in good faith, would not relieve him from liability." 524 U.S. at 649. The Court stated that the "courts should assess the objective reasonableness of the views of health care professionals without deferring to their individual judgment". *Id.* 524 U.S. at 650. In this case, the district court and the Circuit Court failed to apply *Arline* and *Bragdon*.

The Eight Circuit Court of Appeals has held that it is a violation of the ADA for an employer to discharge an employee it suspects of being an alcoholic for refusing the employer's demand that the employee enter treatment without establishing the medical necessity of the treatment. *See Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1996) (employer may not discharge suspected alcoholic for refusing employer's treatment demand); *see also Jones v. Correction Corp. of America*, 993 F.Supp. 1384, 1387 (D. Kan. 1998) (employee who alleged that employer erroneously believed him to be drug addict following disputed drug test and who was fired for refusing to agree to enter treatment states a claim under ADA – "an employee cannot be required to accept an unnecessary accommodation"); 29 C.F.R. ' 1630.9(D) ("A qualified individual with a disability is not required to accept an accommodation, aid, service, opportunity or benefit which such qualified individual chooses not to accept").

As a result of the lower courts' failure to apply the proper standards in this case, there is no competent medical evidence in the record to establish the nature or extent of Dr. Bekker's alleged alcohol abuse or the likelihood that she would be impaired at work. Neither is there any competent medical evidence regarding the nature of the treatment program that she was expected to agree to or to the medical or business necessity of the treatment.

An employer's ability to impose medical treatment on an employee is a serious issue. The Court should accept this case

to clarify that, before an employer may impose treatment on a disabled employee, it must produce competent medical evidence of the nature and extent of the disability and the medical necessity of treatment, and that the affected employee is entitled to discover and challenge that medical evidence.

CONCLUSION

The decisions of the district court and the Circuit Court are at odds with the Americans With Disabilities Act and its regulations, the decisions of other Courts of Appeals, and the controlling decisions of this Court. The legal issues presented are important ones that have application to a broad range of cases. Therefore, we submit that the Court should grant this Petition.

Respectfully submitted,
Jeffrey M. Carey
10 South LaSalle Street
Suite 3300
Chicago, Illinois 60603
(312) 251-2340
Attorney for Petitioner
Stephanie Bekker

(any footnotes trail end of each document)
Nos. 99-1215 & 99-1218

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STEPHANIE BEKKER,
Plaintiff-Appellant,

v.

HUMANA HEALTH PLAN, INCORPORATED,
Defendant-Appellee.

January 5, 2000, Argued

September 27, 2000, Decided

COUNSEL:
For STEPHANIE BEKKER, Plaintiff - Appellant (99-1215, 99-1218): Jeffrey M. Carey, Chicago, IL USA.

For HUMANA HEALTH PLAN, INCORPORATED, Defendant - Appellee (99-1215, 99-1218): Michael G. Cleveland, VEDDER, PRICE, KAUFMAN & KAMMHOLZ, Chicago, IL USA.

JUDGES:
Before POSNER, EASTERBROOK and RIPPLE, Circuit Judges.

OPINIONBY:
RIPPLE

OPINION:

RIPPLE, *Circuit Judge.* Dr. Stephanie Bekker worked as a physician for Humana Health Plan, Inc. ("Humana") until Humana discharged her because it had received numerous reports that Dr. Bekker had smelled of alcohol and had exhibited other signs of alcohol use when seeing her patients. After her discharge, Dr. Bekker filed this action against Humana; she alleged that Humana discriminated against her on account of her perceived disability of alcoholism in violation of the Americans with Disabilities Act ("ADA"), *42 U.S.C. § 12101* et seq. The district court granted summary judgment for Humana. For the reasons set forth in the following opinion, we affirm the judgment of the district court.

I

BACKGROUND

A. Facts[1]

Dr. Stephanie Bekker began practicing as an internist at Humana's Lincoln Park Center in 1983.[2] She worked weekdays and every other Saturday. She also had on-call duty, which required her to work 24-hour shifts three to five times a month. At times, she was the only physician on the premises at the Lincoln Park Center.

1.

In 1990, a nurse at Humana informed the Clinical Director for the Lincoln Park Center, Dr. Thomas, that a rumor was circulating that Dr. Bekker smelled of alcohol while working. Dr. Thomas discussed the rumor with Dr. Bekker. That discussion led to the conclusion that the odor probably was Dr. Bekker's mouthwash.

In 1995, a patient reported that she had smelled alcohol on Dr. Bekker during her appointment. Dr. Bekker, at Humana's request, thereafter agreed to undergo an independent clinical evaluation to determine whether she suffered from an alcohol disorder. This evaluation was conducted at Rush-Presbyterian-St. Luke's Medical Center ("Rush") and was headed by Dr. Paul Feldman, a physician who specializes in the diagnosis and treatment of substance abuse, particularly substance abuse by physicians. At the completion of the evaluation, Dr. Feldman did not diagnose Dr. Bekker with alcohol abuse or dependence. He did, however, find "indicators suggestive of problematic alcohol usage." R.56 at 4. One of these indicators was a report from another physician who worked with Dr. Bekker. In this report, Dr. Bekker's colleague had stated that, while Dr. Bekker was working, he had smelled alcohol on Dr. Bekker's breath three or four times in the past five years; two of those occasions had occurred in the previous four months. Having found problematic alcohol usage, Dr. Feldman recommended that Dr. Bekker refrain from alcohol for one year and submit to random urine or blood testing to check for the presence of alcohol. Dr. Bekker agreed to the recommended program, refrained from alcohol for one year, and submitted to the random alcohol testing 13 times during that year; all the test results were negative. After the year ended, Dr. Bekker resumed social drinking.

2.

In 1996, another patient complained that Dr. Bekker had smelled of alcohol during her appointment. When advised of the complaint, Humana's Director of Employee Health Services/Risk Management, Diane Dusek, initiated an investigation and suspended Dr. Bekker pending the resolution of the investigation.

In her investigation, Dusek spoke first with the patient who had made the complaint. The patient confirmed that Dr.

Bekker had smelled of alcohol during her appointment. Also, the patient stated that Dr. Bekker may have smelled of alcohol on a previous visit. Dusek then spoke with Dr. Bekker. In their conversation, Dr. Bekker denied drinking before or during working hours or while she was on call.

The next day, Dr. Bekker again spoke with Dusek and suggested three possible reasons why she may have smelled of alcohol: (1) her face wash contained traces of alcohol, (2) her air freshener may have resembled the scent of alcohol, or (3) when she had recycled some beer bottles, the scent had lingered on her. Dr. Bekker offered to undergo daily alcohol testing to prove that she was not working while under the influence of alcohol. She also volunteered to pay for the cost of the breathalyser equipment needed to conduct the alcohol testing. Dusek refused her offer but continued her investigation into Dr. Bekker.

Dusek interviewed other staff members at Humana during the course of her investigation. A medical assistant reported that she had smelled alcohol on Dr. Bekker at least once a week, that Dr. Bekker had glassy eyes when the odor was present, and that both patients and employees had commented to her about the odor. A nurse reported that she had smelled alcohol on Dr. Bekker two or three times a week over the previous two years and that patients had commented to her that Dr. Bekker or her examination room had smelled of alcohol. Another employee also reported that Dr. Bekker had smelled of alcohol on at least a weekly basis, that Dr. Bekker's face was flushed and her eyes were dilated when the odor was present, and that a patient had commented to her that Dr. Bekker smelled of alcohol. Two triage nurses confirmed that they had smelled alcohol on Dr. Bekker and that other employees had spoken of the situation. Another physician reported that a week or two before the investigation, she had smelled an unusual odor on Dr. Bekker and had wondered if it was alcohol.

Humana did not test Dr. Bekker on any of the occasions when she allegedly smelled of alcohol, although testing is the only conclusive means to determine whether the substance that people reported smelling was in fact alcohol. Dusek stated that she found no evidence that Dr. Bekker consumed alcohol while at work, that she reported to work while impaired by alcohol, or that her professional care was diminished as a result of alcohol impairment. Dusek also admits that she never found evidence that Dr. Bekker actually provided poor patient care or exercised poor medical judgment. Also, Dr. Bekker's colleague, Dr. Thomas, stated that she did not think that Dr. Bekker ever drank alcohol at work.

Humana's Vice-President and Medical Director for Chicago, Dr. Ernest Weis, determined that, although Dr. Bekker could be discharged under her employment contract for cause, he would continue her employment if she agreed to certain terms. Under his proposed agreement, Dr. Bekker must (1) submit to a clinical evaluation, (2) attend a prescribed formal recovery program, (3) undergo random alcohol testing for two years, (4) submit all test results and treatment plans to Humana's Employee Health Services, and (5) if she resigned during any treatment, agree to advise any future employer of her condition and to provide reports to Humana regarding her treatment. The agreement also stated that Dr. Bekker would be discharged if she failed to comply with the terms of the agreement, if Humana received any further complaints about Dr. Bekker's smelling of alcohol, or if Humana determined that Dr. Bekker was using any mood-altering chemicals.

In a meeting on December 6, 1996, Dr. Weis informed Dr. Bekker of these conditions and told her that he believed that she had a drinking problem that required treatment. He advised her that her employment would be continued only if she agreed to his conditions. During the meeting, Dr. Bekker again denied drinking on the job or reporting to work under

the influence of alcohol. She offered to undergo daily testing, but Dr. Weis declined her offer. She told Dr. Weis that she would seek a second independent evaluation to prove that she was not under the influence of alcohol while at work. Finally, Dr. Bekker stated that she wanted to seek the advice of counsel before agreeing to Dr. Weis' conditions. Dr. Weis agreed. He did not set, at that time, a deadline by which Dr. Bekker needed to accept his conditions before he would discharge her.

On Monday, December 9, Dr. Bekker visited Dr. Feldman at Rush for her second evaluation. Prior to the appointment, Dr. Feldman received a communication from Dusek at Humana. Dr. Feldman did not disclose to Dr. Bekker the contents of Dusek's communication nor did he perform a clinical evaluation of Dr. Bekker that day. Instead, he recommended to Dr. Bekker that she check herself into Rush's residential treatment program. Dr. Bekker declined and stated that she wished to discuss the situation with counsel. Although Dr. Bekker never authorized Dr. Feldman to communicate with Humana, after her appointment, Dr. Feldman called Dusek to tell her that he had recommended treatment for Dr. Bekker so he could ascertain whether Dr. Bekker had a problem with alcohol.

The next day, December 10, Dr. Bekker called Dusek to inform her that she had contacted counsel regarding Dr. Weis' conditions. She told Dusek that her attorney would not be available until Monday, December 16; Dusek did not object to the delay.

On December 12, after hearing from Dusek that Dr. Bekker was not reviewing the proposed conditions with counsel until December 16, Dr. Weis sent a letter to Dr. Bekker by messenger. In the letter, he told her that she needed to accept his conditions by 9 a.m. on December 16 or her employment would be terminated.

In response to Dr. Weis' demand for an answer, Dr. Bekker met with alternative counsel on Friday, December 13. Counsel faxed a letter to Dr. Weis to request both information from Humana and a meeting with Dr. Weis. Nobody at Humana responded; indeed, Humana denies receiving this letter.

Dusek did not hear from Dr. Bekker on December 16, and she therefore informed Dr. Weis that Dr. Bekker had not contacted her. That same day, Dr. Weis called Dr. Feldman and requested information about Dr. Bekker's condition so that he could confront her. In a letter to Dusek dated December 16, Dr. Feldman wrote that he believed Dr. Bekker met the criteria for alcohol abuse. He wrote that, although Dr. Bekker did not appear to drink in the workplace, she drank heavily the night before and that the odor lingered into the next day. He also recommended that Dr. Bekker refrain from practicing medicine and enter a treatment program for chemically dependent healthcare professionals. Neither Dusek nor Dr. Weis spoke with Dr. Feldman after receiving this letter.

Dr. Weis sent a letter to Dr. Bekker on December 17 that informed her of her discharge. Dr. Weis later stated that he had terminated Dr. Bekker because he believed that she was an alcoholic and because she would not agree to the conditions he proposed at the December 6 meeting. He stated that Dr. Bekker presented a risk to her patients because, as an alcoholic, she might make bad clinical decisions. He also stated that she was a business threat because patients would not like seeing a physician who smelled of alcohol. He admitted that he did not know of any bad clinical decisions that she had made or of any patients who had stopped coming to her because of her problem.

3.

After Dr. Bekker's termination, Humana revoked her credentials. Dr. Bekker appealed, and the Appeals Committee

recommended that she and Dr. Weis discuss the situation. He refused.

Humana has a policy against alcohol and drug use in the workplace. It states that "Employees shall be prohibited from working while under the influence of alcohol and/or drugs. . . . Compliance with this policy is a condition of continued employment.Violation of any aspect of this policy may subject the employee to disciplinary action, up to and including discharge." Ptf. Ex.8.

In Humana's view, alcohol use and perceived alcohol use by its physicians can have many adverse effects. Primarily, a physician under the influence of alcohol may provide poor patient care and exercise poor medical judgment. However, even if patient care is not compromised, Humana's view is that it is unprofessional for a physician to attend patients while smelling of alcohol; the patient may not have the appropriate respect for a physician smelling of alcohol, and this lack of respect could discourage the patient from following the physician's advice. Finally, Humana believes that, when one of its physicians smells of alcohol, she projects an unprofessional image, which harms the reputation of Humana and Humana's other physicians.

The relationship between Humana and Dr. Bekker was governed by a written employment contract. This contract stated that the agreement "shall automatically terminate, effective immediately, upon notification by Medical Director . . . upon one or more of the following occurrences: . . . [Humana] reasonably believes that the health or safety of patients is endangered by PHYSICIAN." R.1-1, Ex.A at 4-5.

After her discharge and the revocation of her credentials, Dr. Bekker filed this action against Humana. She alleged that Humana discriminated against her in violation of the ADA because it perceived her as disabled by alcoholism.

B. District Court Proceedings

1.

The district court determined that Dr. Bekker was not a "qualified individual with a disability" under the ADA. The court stated first that Dr. Bekker had offered enough evidence to show that Humana perceived her as having the disability of alcoholism. Dr. Bekker proffered statements of Dr. Weis, the decision maker, that showed that he perceived her as an alcoholic incapable of working as a physician. Moreover, noted the court, when an employer offers an employee a choice between a treatment program and termination, the court reasonably may conclude that the employer perceived the employee as disabled by chemical dependence.

In determining whether Dr. Bekker was a "qualified" individual with a disability, the court stated that Dr. Bekker bore the burden of establishing that she was not a direct threat to the health or safety of her patients and that she therefore was qualified. Being a direct threat, the court stated, meant that Dr. Bekker presented a significant risk of substantial harm to the health or safety of others that could not be reduced or eliminated by reasonable accommodation. A conclusion that Dr. Bekker was a direct threat required an individualized assessment, based on reasonable medical judgment, of her present ability to perform safely the essential functions of her job. According to the court, the assessment should examine (1) the duration of the risk, (2) the nature and severity of the potential harm, (3) the likelihood that the potential harm will occur, and (4) the imminence of the potential harm.

The court determined that ample evidence existed to show that Dr. Bekker was a direct threat to her patients' health or safety, as demonstrated by the numerous reports of people smelling alcohol on her while at work and by the reports of several employees who had observed her with glassy eyes. Reports of Dr. Bekker's smelling of alcohol were

filed in 1990, 1995, and 1996. Thus, the court concluded, her drinking was of long duration with no clear end in sight. As well, the number of reports were substantial and appeared to be increasing. These facts, stated the court, indicated that there was an increasing likelihood of harm and that the harm was imminent. Therefore, the court held, Humana possessed sufficient evidence to show that Dr. Bekker was reasonably likely to be a direct threat to her patients. The court discounted Dr. Bekker's attempts to show she was not a direct threat. The court acknowledged that Dr. Bekker met professional standards and that she had not actually made any poor medical judgments. However, the court reasserted that the applicable assessment examined her present ability to perform safely the essential functions of her job and the likelihood she would cause *future* harm. The court also rejected Dr. Bekker's contention that her assessment had not been based on objective medical evidence. In the court's view, employee and patient reports of her smelling of alcohol constituted sufficiently objective evidence.

If a disabled employee is a direct threat, the court continued, it must determine whether that threat can be reduced or eliminated by reasonable accommodation. The court rejected Dr. Bekker's argument that she would not have been a direct threat if Humana had adopted her suggestion of daily testing as a reasonable accommodation to her perceived disability. Humana did not need to adopt Dr. Bekker's suggestion of daily testing, the court reasoned, because the costs were excessive in relation to the benefits of such a regimen. Although daily testing would show whether Dr. Bekker was under the influence of alcohol, its costs outweighed the need for such daily information. Such testing, the district court continued, would not determine whether Dr. Bekker had used alcohol after she was tested, and Humana could not be expected to monitor her 24 hours a day. Also, noted the court, the burden on Humana to test Dr. Bekker daily would be unreasonable because it would place her co-

workers in an awkward position when testing her and because there would be times when no one was available to administer the test to her. The court also stated that, even if daily testing were reasonable, Humana was not required to provide Dr. Bekker with the accommodation she requested or preferred but only with "some reasonable accommodation"; prospective treatment for an alcoholic is a reasonable accommodation. The court therefore held that Dr. Bekker was not a qualified individual with a disability under the ADA.

2.

The district court also held that, even if Dr. Bekker was a qualified individual with a disability, Humana had a legitimate nondiscriminatory reason for terminating her. An employer may discharge an alcoholic employee for conduct it would not tolerate in a sober employee or an intoxicated employee who is not an alcoholic. Humana was justified in discharging Dr. Bekker, the court concluded, because the reports that she smelled of alcohol were sufficient to find that she was under the influence of alcohol, and Humana could have discharged a worker who was not an alcoholic under the same circumstances.

3.

The court concluded that Humana could terminate Dr. Bekker under the employment contract if Humana reasonably believed that Dr. Bekker endangered the health and safety of her patients. Sufficient evidence existed, the court concluded, for Humana to determine that she did present such a danger to the health and safety of her patients. Therefore, the court held that Humana did not breach its employment contract with Dr. Bekker.

II

DISCUSSION

A. Standard of Review

We review de novo the district court's decision to grant summary judgment to Humana. *See Wright v. Illinois Dep't of Corrections, 204 F.3d 727, 729 (7th Cir. 2000).* Summary judgment is proper when the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986).* In determining whether a genuine issue of material fact exists, we must review the record in the light most favorable to Dr. Bekker and make all reasonable inferences in her favor. *See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986); Robin v. Espo Eng'g Corp., 200 F.3d 1081, 1088 (7th Cir. 2000).*

To avoid summary judgment, Dr. Bekker was required to set forth specific facts showing that a genuine issue for trial existed. *See Silk v. City of Chicago, 194 F.3d 788, 798 (7th Cir. 1999).* She had to produce, moreover, more than a scintilla of evidence to support her position. *See id.* [**18] "A genuine issue of fact 'exists only when a reasonable jury could find for the party opposing the motion based on the record as a whole.'" *Bellaver v. Quanex Corp., 200 F.3d 485, 492 (7th Cir. 2000)* (quoting *Pipitone v. United States, 180 F.3d 859, 861 (7th Cir. 1999)).*

B. Discrimination

The ADA prohibits an employer from discriminating against a qualified individual with a disability. *See 42 U.S.C. § 12112*(a).[3] The term "qualified individual with a disability" "means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual

holds or desires." *42 U.S.C. § 12111*(8).[4] To establish disability discrimination, therefore, Dr. Bekker must show that (1) she is disabled within the meaning of the ADA, (2) she is qualified to perform the essential functions of her job either with or without reasonable accommodation, and (3) she suffered from an adverse employment decision because of her disability. *See Moore v. J.B. Hunt Transp., Inc., 221 F.3d 944, 2000 U.S. App. LEXIS 17312, No. 99-1853, 2000 WL 994327,* *3 (7th Cir. July 19, 2000). In order to prevail, Dr. Bekker must establish all three elements of her claim.

First, Dr. Bekker must establish that she is disabled. To be disabled within the meaning of the ADA, Dr. Bekker must demonstrate that she (1) has "a physical or mental impairment that substantially limits one or more of the major life activities of such individual;" (2) has "a record of such an impairment;" or (3) is "regarded as having such an impairment." *42 U.S.C. § 12102*(2); *see also Schneiker v. Fortis Ins. Co., 200 F.3d 1055, 1059-60 (7th Cir. 2000).* Dr. Bekker claims, and Humana admits, that she comes within the third definition of disability because Humana regarded her as an alcoholic.

Humana nevertheless posits that, even if Dr. Bekker is an alcoholic, she is not a qualified individual with a disability because she presents a direct threat to the health and safety of her patients. "The term 'direct threat' means a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *42 U.S.C. § 12111*(3). The district court agreed with Humana's assessment when it granted summary judgment to Humana. We have no disagreement with the analysis of the district court, which we already have set forth at length. Nevertheless, even assuming [**21] that Dr. Bekker is a qualified individual with a disability, Humana was justified in discharging her.

1.

Under the ADA, an employee has available two methods for establishing that her employer discriminated against her based on her disability. *See Cheek v. Peabody, 97 F.3d 200, 203 (7th Cir. 1996).* First, the employee "may present direct or circumstantial evidence that the employment decision was motivated by the employer's discriminatory animus." *Bellaver, 200 F.3d at 492; see also DeLuca v. Winer Indus., Inc., 53 F.3d 793, 797 (7th Cir. 1995).* Second, the employee may use the burden-shifting method set forth in *McDonnell Douglas Corporation v. Green, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973),* to prove by indirect evidence that her employer intentionally discriminated against her. *See Robin, 200 F.3d at 1088; DeLuca, 53 F.3d at 797.*

2.

We focus for now on the first of these methods. "Evidence of discrimination may be direct or circumstantial." *Sheehan v. Donlen Corp., 173 F.3d 1039, 1044 (7th Cir. 1999).* Direct evidence is evidence that "'in and of itself suggests' that someone with managerial authority was 'animated by an illegal employment criterion.'" *Id.* (quoting *Venters v. City of Delphi, 123 F.3d 956, 972 (7th Cir. 1997)).* "When the employee has presented evidence that the employer was motivated in part by discrimination, the defendant may then avoid a finding of liability by proving that *it would have made the same decision absent discrimination." Bellaver, 200 F.3d at 492* (emphasis added). To survive a motion for summary judgment, therefore, Dr. Bekker must present sufficient evidence to allow a rational jury to reasonably conclude that, but for her disability of alcoholism, Humana would not have discharged her. *See Robin, 200 F.3d at 1089.*

We note that an employer:

> (1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
>
> (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
>
> . . . .
>
> (4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee . . .

42 U.S.C. § 12114.

Dr. Bekker claims that Humana terminated her because it believed she was an alcoholic and not because it believed she was working while under the influence of alcohol. Humana submits that it was justified in terminating Dr. Bekker based on the complaints it received about her. Humana claims that it may hold an alcoholic employee to the same standards as a non-alcoholic employee. Because a non-alcoholic employee would be terminated if Humana concluded she was under the influence of alcohol while working, Humana contends that Dr. Bekker could be terminated under the same circumstances. Due to the serious risks to patients of being treated by a physician under the influence of alcohol, Humana states that it would be justified in terminating Dr. Bekker merely because she smelled of alcohol.

The risks of harm when a patient is seen by a physician under the influence of alcohol are many and serious. A physician under the influence of alcohol could prescribe the wrong medication or an incorrect dosage of medication. She could misdiagnose the patient's condition or could miss an important symptom indicative of a more serious condition, possibly one needing immediate attention or posing a threat to life. Moreover, a physician under the influence of alcohol might be clumsy with her instruments and cause serious harm to the patient because of a slip of the hand or a second of inattention. Furthermore, the confidence of a patient in the capabilities of the physician understandably would be undermined if the patient became aware that the physician was under the influence of alcohol.

Humana has presented sufficient evidence to show that it had good reason to believe that Dr. Bekker was under the influence of alcohol while seeing patients. During Dusek's investigation, she received reports from employees and patients who had smelled alcohol on Dr. Bekker while she was working. Moreover, several of the employees had observed her with glassy or dilated eyes and a flushed face, signs of alcohol use. Reports stating that Dr. Bekker smelled of alcohol were filed in 1990, 1995, and 1996; the number of reports regarding Dr. Bekker were substantial and appeared to be increasing. In short, all of the reports indicating that Dr. Bekker was seeing her patients while under the influence of alcohol substantiate Humana's decision to discharge Dr. Bekker.

Furthermore, the persistent nature of the problem, despite Humana's intervention, substantiates the need for concern on the part of Humana. After the first patient reported that she had smelled alcohol on Dr. Bekker, Humana required her to undergo treatment, but, despite this treatment, Dr. Bekker continued to appear at work smelling of alcohol. The large number of reports of Dr. Bekker's symptoms also indicate the repetitious and long-term nature of Dr. Bekker's problem.

With a suggestion of such pervasive alcohol use while Dr. Bekker was seeing patients, Humana was justified in terminating Dr. Bekker. A physician in such a patient-oriented practice, whether or not she is an alcoholic, justifiably could be discharged by her employer if the employer received numerous reports that suggested that the doctor was seeing patients under the influence of alcohol.[5] Moreover, Humana has, and the ADA explicitly allows for, a policy prohibiting the use of alcohol in the workplace. Dr. Bekker, therefore, failed to present direct proof of intentional discrimination by Humana on account of a perceived disability of alcoholism. Indeed, Humana has offered substantial proof that it was justified in discharging her on the ground that she posed an immediate risk to patients.

3.

Dr. Bekker's case would fare no better under the *McDonnell Douglas* burden-shifting approach. *See Cheek, 97 F.3d at 203.* The Supreme Court established the burden-shifting method of proving intentional discrimination "because employers usually are careful not to offer smoking gun remarks indicating intentional discrimination. . . ." *Robin, 200 F.3d at 1088.* Under this method, a plaintiff first must establish a prima facie case of discrimination by her employer, which creates a presumption of intentional discrimination. *See id.; Bellaver, 200 F.3d at 493.* The burden of production then shifts to the employer to articulate a legitimate, nondiscriminatory reason for the adverse employment action. *See DeLuca, 53 F.3d at 797.* Once the employer has proffered a legitimate reason, the inference of discrimination disappears, and the plaintiff must prove by a preponderance of the evidence that the employer's proffered reason was a pretext for intentional discrimination. *See Robin, 200 F.3d at 1088; Bellaver, 200 F.3d at 493.* The ultimate burden to prove intentional discrimination remains with the plaintiff. *See St. Mary's Honor Ctr. v. Hicks, 509*

U.S. 502, 507-08, 125 L. Ed. 2d 407, 113 S. Ct. 2742 (1993); Bellaver, 200 F.3d at 493.

Assuming for the sake of argument that Dr. Bekker could establish a prima facie case of discrimination, Humana has proffered a legitimate nondiscriminatory reason for her discharge: the belief that she was under the influence of alcohol while seeing patients. Dr. Bekker has not presented any evidence to show that Humana's legitimate reason for her discharge was pretextual. By failing to rebut Humana's legitimate, nondiscriminatory reason, Dr. Bekker cannot meet her burden to show that she was a victim of intentional discrimination by Humana.

C. Breach of Employment Contract

The relationship between Humana and Dr. Bekker was governed by a written employment contract. This contract stated that the agreement "shall automatically terminate, effective immediately, upon notification by Medical Director . . . upon one or more of the following occurrences: . . . [Humana] reasonably believes that the health or safety of patients is endangered by PHYSICIAN." R.1-1, Ex.A at 5.

Dr. Bekker states that enough evidence exists to demonstrate that a material fact question exists about whether Dr. Bekker was a threat to patient safety and that summary judgment therefore should not have been entered for Humana. Humana asserts that it did not breach her employment contract. The employment contract stated that, when Humana reasonably believed that Dr. Bekker was endangering the health or safety of her patients, she would automatically be discharged. The evidence shows that, based on the numerous reports of its employees and patients, Humana reasonably believed Dr. Bekker to be a threat to her patients' health or safety. Humana therefore did not breach her employment contract.

Conclusion

For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED

FOOTNOTES

[1] The district court, acting at the request of the parties, placed the record in this case under seal. Although appellate proceedings can be sealed only by order of this court, *see Union Oil Co. v. Leavell, 220 F.3d 562, 2000 WL 987701 (7th Cir. 2000)* (publication page references not available), no such request has been made in this court. Moreover, the parties have proceeded with unsealed briefs and presented oral argument in open court. In any event, the facts disclosed here are no more intrusive than those found in similar disability cases, and their presentation is necessary to afford a clear understanding of our holding to those who rely on our precedents.

[2] Dr. Bekker originally started working for Humana's predecessor in 1983; however, because Humana is the party to this action, we shall refer only to Humana.

[3] The ADA prescribes that:

> No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a).

[4] The term "reasonable accommodation" may include:

> job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9).

[5] Before the district court, Dr. Bekker moved to strike her Rush medical records under the federal confidentiality of records statute, *42 U.S.C. § 290dd-2,* the Illinois statute on medical privileges, 735 ILCS § 5 8-802, and the bar to hearsay in the Federal Rules of Evidence. The district court denied her motion and allowed Humana to submit the documents in support of its motion for summary judgment. The district court's evidentiary rulings are reviewed for an abuse of discretion. *See Rehling v. City of Chicago, 207 F.3d 1009, 1017 (7th Cir. 2000).*

Even if we were to determine that the district court abused its discretion in making its evidentiary ruling, we still would affirm the district court. "[A] trial court's erroneous rulings may be deemed harmless if the record indicates that the trial court would have rendered the same judgment regardless of the error." *Barber v. Ruth, 7 F.3d 636, 641 (7th Cir. 1993).* We do not need to ascertain whether the district court incorrectly considered Dr. Bekker's medical records because we believe that, even without Dr. Bekker's medical records, sufficient evidence exists in the record to support Humana's decision to discharge Dr. Bekker. As we have noted in the text, Humana collected numerous reports from a variety of employees that documented the employees' repeated exposure to Dr. Bekker while she smelled of alcohol

and exhibited other physical symptoms of alcohol use. The reports indicated that this problem occurred frequently and over a long period of time. Moreover, the problem was blatant enough that numerous employees as well as several patients commented on it. Based on these reports, even without Dr. Bekker's medical records, Humana had sufficient evidence to discharge Dr. Bekker.

Nos. 97C4643 & 97C6771

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEPHANIE BEKKER,
Plaintiff

v.

HUMANA HEALTH PLAN, INCORPORATED,
Defendant.

December 21, 1998

MEMORANDUM

Before this court are cross-motions for summary judgment in 97 C 4643 ("Bekker I"), Defendant Humana Health Plan, Inc.'s ("Defendant") motion for sumrnazy judgment in 97 C 6771 ("Bekker Il"), and Plaintiff Stephanie Bekker's ("Plaintiff") motion to strike/motion in limine as to all communications by Dr. Paul Feldman ("Feldman") of Rush Behavioral Center ("Rush") as to both Bekker I and Bekker II fn1. Defendant's motion for summary judgment in Bekker I address the remaining claims in Plaintiffs complaint, which alleges that Defendant's discharge of Plaintiff violates the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 et seq. (Count I), and constitutes breach of contract (Count II).fn2 Plaintiffs motion for summary judgment in Bekker J addresses only the ADA claim (Count I). Defendant's motion for summary judgment in Bekker II addresses the only claim in Plaintiff's complaint in that case,

which alleges that Defendant's revocation of Plaintiff's clinical credentials violations the ADA. For the following reasons, Defendant's motions for summary judgment in Bekker I and Bekker II are GRANTED, Plaintiff's motion for summary judgment is DENIED, and Plaintiff's motion to strike/motion in limine is DENIED. This case is CLOSED.

I. Facts

Plaintiff is a licensed medical doctor. (Dft's 12(M) Stmt. ¶ 1 .)fn3 Plaintiff was hired as a practicing internist in August 1983 by North Care Medical Group, which was subsequently acquired by Michael Reese Health Plan. (Dft's 12(M) Stmt. ¶ 1.) In March 1991, Defendant, a health maintenance organization, acquired Michael Reese Health Plan. (Dft's 12(M) Stmt. ¶2.) After the acquisition by Defendant, Plaintiff continued to hold a practicing internist position at Defendant's Lincoln Park Center. (Dft's 12(M) Stmt. ¶ 3.) Plaintiff worked weekdays and every other Saturday. (Dft's 12(M) Stmt. ¶ 4.) On occasion, Defendant was the only physician present at the Lincoln Park Center. (Dft's 12(M) Stmt. ¶ 5.) Plaintiff also had on-call responsibilities, which required her to work twenty-four hour shifts three to five times per month. (Dft's 12(M) Stint. ¶ 6.) Plaintiff's employment with Defendant was governed by a written employment agreement ("Employment Agreement"). (Dft's 12(M) Stmt. ¶ 7.) Employment Agreement ¶ 3.4, entitled "PLAN Termination of Agreement/Automatic," provides in part:

> At PLAN's option, this Agreement shall automatically terminate, effective immediately upon notification by Medical Director of PLAN . . . upon one or more of the following occurrences:
>
> d. PLAN or any applicable state or federal regulatory agency reasonably believes that the health

and safety of patients is endangered by PHYSICIAN.

(Dft's 12(M) Stmt. ¶ 7.)

In 1990, a nursing supervisor informed Dr. Frances Thomas ("Thomas"), the Clinical Director for the Lincoln Park Center, about a rumor that Plaintiff smelled of alcohol. (Dft's 12(M) Stmt. ¶ 8.) Prior to Plaintiff's termination, Thomas was Plaintiff's close friend. (Dft's 12(M) Stmt. ¶ 9.) Thomas discussed the rumor with Plaintiff, and they concluded that the odor may have been caused by Plaintiffs mouthwash. (Dft's 12(M) Stmt. ¶ 10.) Consequently, Thomas did not pursue the issue further. (Dft's 12(M) Stmt. ¶ 11.)

In the spring of 1995, a patient complained that he had smelled alcohol on Plaintiff on three occasions. (Dft's 12(M) Stint. ¶ 12.)fn4 The complaint was forwarded to Humana's Employee Health Services Department ("EHS"), which is responsible for investigating such complaints. (Dft's 12(M) Stmt. ¶ 13.) As part of this process, either Diane Dusek ("Dusek"), Direct of Risk Management and EHS, or Judith Dishno, Manager of EHS, informed Plaintiff that she was to have an independent medical evaluation and referred her to Feldman at Rush. (Dft's 12(M) Stmt. ¶ 14.) Feldman is a specialist in alcohol and substance abuse, particularly with respect to physicians. (Dft's 12(M) Stmt. ¶ 15.)fn5 After conducting an evaluation, Feldman decided to "defer a diagnosis of alcohol abuse or dependence at this time." (Dft's 12(M) Stmt. ¶ 16.) However, he found that "there are indicators suggestive of problematic alcohol usage," including a report from a physician who worked with Plaintiff that he had smelled alcohol on Plaintiff's breath on three or four occasions in the past five years, including two occasions in the previous four months. (Dft's 12(M) Stmt. ¶ 16.) Feldman recommended that Plaintiff remain abstinent from alcohol and submit to a year of monthly random urine testing by the Illinois State Medical Society Physician

Assistance Program. (Dft's 12(M) Stmt. ¶ 17.) Plaintiff agreed to those recommendations. (Dft's 12(M) Stmt. ¶ 17.) Plaintiff was subsequently tested thirteen times, and all of her tests were negative. (Dft's 12(M) Stmt. ¶ 18.) Defendant paid for these tests, as well as for the evaluation, and Plaintiff continued to be a paid employee of Defendant seeing Defendant's patients. (Dft's 12(M) Stmt. ¶ 19.) After the testing period ended in June 1996, Plaintiff resumed drinking. (Dft's 12(M) Stmt. ¶ 20.)

On Friday, November 22, 1996, a patient complained to Cherie Sullivan ("Sullivan"), a Medical Assistant, that Plaintiff, who had just examined the patient, smelled of alcohol. (Dft's 12(M) Stmt. ¶ 21.) Dusek was advised of the complaint and began an investigation. (Dft's 12(M) Stmt. ¶ 22.) Dusek spoke with the patient by telephone on November 25, 1996. (Dft's 12(M) Stmt. ¶ 23,) The patient, who was a substance abuse counselor, confirmed again that Plaintiff had smelled of alcohol during her November 22, 1996 examination and added that she may have also smelled the odor in July 1995 but did not report it. (Dft's 12(M) Stmt. ¶ 24.) On November 26, 1998, Dusek telephoned Plaintiff, who had been suspended with pay pending the results of the investigation, for Plaintiffs account of the situation. (Dft's 12(M) Stmt. ¶ 25.) Plaintiff denied using alcohol before or during scheduled work hours or when oncall. (Dft's 12(M) Stmt. 126.) The next day Plaintiff called Dusek and offered three possible reasons for her smelling of alcohol: her Bonne Bell face wash, her air freshener, and her recycling of beer bottles. (Dft's 12(M) Stmt. ¶ 27.) During the November 27, 1996 conversation between Dusek and Plaintiff, Plaintiff offered to undergo daily testing under Defendant's supervision to assure that she does not drink alcohol or report to work under the influence of alcohol. (Ptf's 12(M) Stmt. ¶ 24.) Plaintiff offered to pay for the necessary Breathalyzer testing equipment of Defendant's choice. (Ptf's 12(M) Stmt. ¶ 24.) During the November 27, 1996 conversation, Dusek

did not accept Plaintiff's offer of daily testing. (Ptf's 12(M) Stmt. ¶ 25.) Dusek also spoke with staff members who worked with Bekker at the Lincoln Park Center. (Dft's 12(M) Stmt. ¶ 28.) Sullivan reported that she had smelled alcohol on Plaintiff at least once a week, that Plaintiff had glassy eyes when the odor was present, and that patients and other employees had commented about the odor. (Dft's 12(M) Stmt. ¶ 29.) Marva Davis ("Davis"), an LPN, told Dusek that she had smelled alcohol on Plaintiff two to three times a week over the last two years and that patients had made comments to her about Plaintiff or Plaintiff's examination room smelling of alcohol. (Dft's 12(M) Stmt. ¶ 30.) Deitra Cephas ("Cephas"), Administrative Supervisor of Appointments, told Dusek that she smelled alcohol on Plaintiff on at least a weekly basis, that when the odor was present Plaintiff's face appeared flushed and her eyes dilated, and that a patient had made a comment about Plaintiff drinking. (Dft's 12(M) Stmt. ¶ 31.) Two triage nurses, Elizabeth Stapleton ("Stapleton") and Nancy Fali ("Fali") also confirmed that they had smelled alcohol on Plaintiff and that other employees also talked about it. (Dft's 12(M) Stmt. ¶ 32; Dft's 12(M) Reply ¶ 32; Dft's Ex. I (Stapleton Dep.) at 27-28 ("Our speculation was that [the odor smelled on Plaintiff] smelled like somebody with a hangover, that there was a strong odor of stale alcohol like as in drinking alcohol odor."). Neither Sullivan, Davis, Cephas, nor Fali had ever reported the odor to anyone in management previously. (Dft's 12(M) Stmt. ¶ 33.) Dusek also spoke with Thomas, who said that approximately a week and a half before she had smelled an unusual odor on Plaintiff while at work and wondered if it was alcohol. (Dft's 12(M) Stmt. ¶ 34.) Defendant did not test Plaintiff on the occasions when she allegedly smelled of alcohol, and testing is the only means to determine conclusively whether the substance that people were smelling was alcohol. (Ptf's 12(N) Stmt. ¶10; Dft's 12(N) Resp. ¶ 10.)fn6 In her investigation, Dusek found no proof that Plaintiff had consumed alcoholic beverages while at work.

(Ptf's 12(M) Stmt. ¶ 27.)

In Defendant's opinion, it is unprofessional for a physician to attend to patients while smelling of alcohol because the patient may not have appropriate respect for the physician or her advice and thus may not follow her advice. (Dft's 12(M) Stmt. ¶ 35.)fn7 When a physician in Defendant's employ smells of alcohol, she projects an unprofessional image and is inimical to the reputation of all of Defendant's physicians and to Defendant as a health care provider. (Dft's 12(M) Stmt. ¶ 36.) Additionally, a physician under the influence of alcohol may provide poor patient care or exercise poor medical judgment, (Dft's 12(M) Stmt. ¶ 37.) Dusek admitted that she never found evidence that Plaintiff actually had provided poor patient care or exercised poor medical judgment. (Ptf's 12(M) Stmt. ¶ 29.) Thomas stated that she told Weis and Wozniak that she thought that Plaintiff did not drink at work. (Ptf's 12(M) Stmt. 1 30; Dft. Ex. D (Thomas Dep.) at 54.) Thomas never saw any evidence that Plaintiff was impaired at work. (Ptf's 12(M) Stmt. ¶ 31.)

After being apprised of the results of Dusek's investigation. Dr. Ernest Weis ("Weis"), Defendant's Vice-President and Medical Director for Chicago, made the determination that while Plaintiff could have been discharged for cause, that he would continue her employment if she agreed to certain terms. (Dft's 12(M) Stmt. ¶ 38; Dfts' 12(M) Reply ¶ 38; Dft's Ex. C (Weis Dep.) at 264-65 ("The grounds [for termination] were the results of our investigation and the patient complaints of suspected alcoholism. ").fn8 The required terms were set forth in a December 6, 1996 letter and a Work Agreement. (Dft's 12(M) Stmt. ¶ 39.) These terms required that Plaintiff (1) submit to a clinical evaluation, (2) attend any prescribed formal recovery program, (3) submit to random testing by Employee Health Services for a two year period, (4) submit all test results and treatment plans to Employee Health Services, and (5) agree

to advise any future employer of her condition if Plaintiff resigned during any treatment. (Dft's 12(M) Stmt. ¶ 39.) Plaintiff also had to agree to continue to provide reports to Defendant regarding her treatment if she voluntarily resigned her employment during the treatment program. (Ptf's 12(M) Stmt. ¶ 47.) Additionally, the letter and Work Agreement provided that any failure to comply with these terms, the receipt of any future complaints about inappropriate behavior, or any determination that Plaintiff had used mood altering chemicals could result in her discharge. (Dft's 12(M) Stmt. ¶39.)fn9 On December 6, 1996, Weis gave the letter and Work Agreement to Plaintiff at a meeting also attended by Dusek, Thomas, and Regional Medical Director Jerry Wozniak ("Wozniak"). (Dft's 12(M) Stun. ¶ 40.) During the December 6 meeting, Weis told Plaintiff that he believed that Plaintiff had a drinking problem that required treatment. (Ptf's 12(M) Stmt. ¶ 33.) Weis advised Plaintiff that she would continue to be paid her salary during the course of the evaluation and any treatment, that Defendant would pay for any treatment program, and that there would be a position for Plaintiff upon completion of any treatment program. (Dft's 12(M) Stmt. ¶ 41.) Plaintiff, however, declined to immediately sign the Work Agreement, stating that she wanted to review it with legal counsel. (Dft's 12(M) Stmt. ¶ 42.) Plaintiff did, however, agree to submit to an evaluation and offered to make the appointment with Rush. (Dft's 12(M) Stmt. ¶ 43.) During the December 6 meeting, Plaintiff again denied drinking on the job or reporting to work under the influence of alcohol. (Ptf's 12(M) Stmt. ¶ 35.) Plaintiff again offered to undergo daily testing daily testing, or whatever testing Defendant desired, to assure that she was not drinking at work or under the influence of alcohol while at work. (Ptf's 12(M) Stmt. ¶ 37.) Weis declined Plaintiffs offer of daily testing. (Ptf's 12(M) Stmt. ¶ 38.) During the December 6 meeting, Defendant did not set any deadline for Plaintiff's acceptance of the conditions. (Ptf's 12(M) Stmt. ¶ 50.)

Plaintiff was seen by Feldman on December 9, 1996. (Dft's 12(M) Stmt. ¶ 44.)fn10 Feldman did not perform a clinical evaluation but, instead, indicated that he had received some information from Dusek. (Dft's 12(M) Stmt. ¶ 3.) Feldman told Plaintiff that she was sick, and he recommended treatment to her. (Dft's 12(M) Stmt. ¶ 4.) After seeing Plaintiff, Feldman informed Dusek by telephone that he recommended that Plaintiff enter a residential treatment program. (Dft's 12(M) Stmt. ¶ 45.) Feldman told Dusek that he wanted Plaintiff to enter treatment 'so he could find out what was going on. If there's a problem, how bad it was, if there is one." (Ptf's 12(N) Stmt. ¶ 5; Dft. Ex. B (Dusek Dep.) at 176.) Feldman subsequently sent a letter to Dusek on December 16, 1996 in which he wrote that he believed that Plaintiff "meets criteria for alcohol abuse." (Dft's 12(M) Stmt. ¶ 46; Dft. Ex. B (Dusek Dep.) Ex. 8 (Feldman letter).) Specifically, Feldman stated:

> After talking with Dr. Bekker, and reviewing her history and the present collateral data, I believe that she meets criteria for alcohol abuse. I believe that Dr. Bekker does not drink in the workplace, but that she does drink heavily the night before and that the smell of alcohol remains during the next day, especially in the morning. Dr. Bekker continues to minimize and display a good deal of denial regarding her drinking. However, her health is clearly at risk, and she is currently sustaining severe professional consequences as a result of her drinking. Our recommendation at this point would be for Dr. Bekker to refrain from the practice of medicine and immediately enter a residential treatment program which has expertise in the care of chemically dependent healthcare professionals. . . I feel it is extremely important, both for Dr. Bekker and in the interest of patient care that she not return to the practice of medicine until she has completed

treatment in a professionals' program.

(Dft. Ex. B (Dusek Dep.) Ex. 8 (Feldman letter).) The letter did not raise the concern in Dusek's mind that Feldman might not have done a complete evaluation. (Dft. Ex. B (Dusek Dep.) at 211.) Feldman never specifically stated that Plaintiff represented a "threat" to her patients. (Ptf's s 12(N) Stmt. ¶ 6.) Neither Dusek nor Weis spoke with Feldman after receiving this letter to ascertain precisely what it meant, e.g., what Feldman's "criteria for alcohol abuse" were. (Ptf's 12(N) Stmt. ¶ 7.) No one told Plaintiff prior to her termination that Feldman had communicated with Defendant, and Plaintiff did not expect that Feldman would be sending a report to Defendant. (Ptf's 12(N) Stmt. ¶ 8; Dft's 12(N) Resp. ¶ 8; Dft. Ex. A (Bekker Dep.) at 131.)

In the interim, Plaintiff called Dusek on December 10, 1996 to inform her that Plaintiffs attorney would be out of town on trial until December 16, 1996 and to request additional time to consider whether to agree to enter the recommended treatment program and to agree to Defendant's other terms. (Dft's 12(M) Stmt. ¶ 47.) Dusek stated that she would inform Weis, and Dusek did, in fact, inform Weis. (Dli's 12(M) Stmt. ¶ 48.) In response, Weis sent a letter to Plaintiff by messenger stating that her response to his December 6, 1996 letter and the Work Agreement was needed by December 16, 1996 at 9:00 a.m. and that, if an unsatisfactory response or no response was received, Defendant would be required to take appropriate action, including termination. (Dft's 12(M) Stmt. 148.) Weis instructed Plaintiff to contact Dusek. (Dft's 12(M) Stmt. ¶ 49.)

Plaintiffs counsel arranged for Plaintiff to meet with another lawyer, Mr. George Hamman, in counsel's absence. (Ptf's 12(M) Stmt. ¶ 53.)" On Friday, December 13, Hamman telefaxed a letter to Defendant on Plaintiff's behalf requesting

a meeting. (Ptf's 12(M) Stmt. ¶54.) Dusek did not hear from Plaintiff and told Weis that Plaintiff had not contacted her. (Dft's 12(M) Stmt. ¶ 50.)fn12 When Weis learned that Plaintiff had not contacted Dusek, be terminated Plaintiffs employment on December 17, 1996 for failure to agree to enter the treatment program recommended by Feldman following a patient complaint that Plaintiff smelled of alcohol and an investigation in which Plaintiff's co-workers confirmed that the smelled alcohol on Plaintiff. (Dft's 12(M) Stmt. ¶ 51.) Weis testified that be believed that Plaintiff was a risk to her patients because, as an alcoholic, she might make bad clinical decisions and that Plaintiff was a business threat because patients would not like going to a doctor who smelled like alcohol. (Dft. Ex. C (Weis Dep.) at 294-95.) Weis admitted that he did not know of any bad clinical decisions that Plaintiff had made or that any patients had ceased coming to Defendant's clinic because of Plaintiff's alleged alcohol problem. (Dft. Ex. C (Weis Dep.) at 294-95.) Both Dusek and Wozniak stated that they did not have evidence that Plaintiff represented a "direct threat" to a patient. (Ptf's 12(N) Stmt. ¶ 14; Dft. Ex. B (Dusek Dep.) at 237; Dft. Ex. E (Wozniak Dep.) at 102.)

The decision to terminate Plaintiffs employment was made by Weis. (Ptf's 12(M) Stmt. ¶ 56.) At the time of Plaintiffs termination, Weis, Dusek, and Defendant believed that Plaintiff suffered from alcoholism that should be treated. (Ptf's 12(M) Stmt. ¶¶ 57-59.) Weis terminated Plaintiff's employment because he perceived that she suffered from alcoholism and would not agree to treatment and the other conditions imposed by Weis during the December 6 meeting. (Ptf's 12(M) Stmt. ¶ 60.) Plaintiff included a copy of Defendant's policy of alcohol and drug use in the workplace. (Ptf. Ex. 8.) That policy states that "Employees shall be prohibited ftom working while under the influence of alcohol and/or drugs" and states that "Compliance with this policy is a condition of continued employment. Violation of any

aspect of this policy may subject the employee to disciplinary action, up to and including discharge." (Ptf. Ex. 8.)

After Plaintiffs termination, Plaintiffs counsel made two requests (in addition to the letter allegedly sent on December 13, 1996 which Defendant denies receiving) to meet with Defendant's representatives, but Defendant refused to meet with Plaintiff's counsel. (Ptf's 12(N) Stmt. ¶ 9; Dft's 12(N) Resp. ¶ 9.) Dusek admitted that treatment would not ascertain whether Defendant was drinking at work and stated that only testing could ascertain for sure. (Ptf's 12(N) Stmt. ¶ 11; Dft. Ex. B (Dusek Dep.) at 166-67.)

At the time of Plaintiffs termination, Plaintiff was fully credentialed by Defendant to perform her duties as a physician. (Ptf's 12(M) Stmt. ¶ 18; Ptf. Ex. 3 (recredentialing notice).) After her termination, Defendant revoked Plaintiff's credentials, (Bekker II. Dft's 12(M) Stmt. ¶¶ 53-56.) At the time of Plaintiff's termination, Plaintiff was performing her duties of patient care at a satisfactory level and was regarded as an above average physician. (Ptf's 12(M) Stmt. ¶ 19.)fn13

II. Motion to strike

Plaintiff has moved to strike her Rush medical records, including a letter by Feldman. The grounds raised for striking these records include the federal confidentiality of records provision, 42 U.S.C. § 290dd-2,fn14 the Illinois statute on medical privileges, 735 ILCS § 518-802, and hearsay. For the following reasons, Plaintiff's motion is DENIED.

Plaintiff argues that § 299dd-2 requires that evidence of her medical treatment be excluded. Section 290dd-2(a) states that "[r]ecords of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of [a covered] program or activity . .

shall . . . be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section." Section 290dd-2(b) states two separate means of disclosure: (1) disclosure pursuant to prior written consent of the patient and (2) disclosure without consent in one of three circumstances, one of which is disclosure "[i] f authorized by an appropriate order of a court of competent jurisdiction granted alier application showing good cause therefor, including the need to avert a substantial risk of death or serious bodily harm. In assessing good cause the court shall weigh the public interest and the need for disclosure against the injury to the patient, to the physician-patient relationship, and to the treatment services. Upon the granting of such order, the court, in determining the extent to which any disclosure of all or any part of any record is necessary, shall impose appropriate safeguards against unauthorized disclosure." 42 U.S.C. § 290dd-2(b)(2)(C). Defendant has not disputed that Rush's program is covered by § 290dd-2 or that Plaintiff was a patient for purposes of § 290dd-2. For purposes of the instant motion, the Court will assume that the materials were disclosed in violation of the statute.

Plaintiffs theory as to the relevance of § 290dd-2 to this case is not entirely clear. There are at least two arguments that could be made:

1. Information disclosed in violation of § 290dd-2 is per se inadmissible; or

2. Information disclosed in violation of § 290dd-2 may not be used by the disclosee to justify actions taken in reliance thereon.

For purposes of completeness, the court will address both arguments.

None of the case law on § 290dd-2 addresses the admissibility of prior disclosed material. For example, in Local 738, International Brotherhood of Teamsters v. Certified Grocers Midwest, Inc., the defendant employer had terminated an employee for drug use after an allegedly wrongful disclosure of the employee's diagnosis of drug abuse. 737 F. Supp. 1030, 1032 (N.D. III. 1990). Contrary to Plaintiffs argument, however, Certified Grocers Midwest did not address the admissibility of the prior disclosed diagnosis but, instead, ruled that the still-undisclosed medical records were not discoverable. Id. at 1034. See also Whyte v. Connecticut Mutual Life Insurance, 818 F.2d 1005, 1008-09 (1st Cir. 1987) (addressing discoverability of medical records); Carr v. Allegheny Health, Education and Research Foundation, 933 F. Supp. 485 (W.D. Pa. 1996) (addressing discoverability of medical records).

The fact that § 290dd-2 limits a court's ability to order the production of documents does not compel the conclusion that, when a party already has possession of documents obtained in violation of that provision, the documents are, without more, inadmissible. The statute does not so expressly require. Indeed, by way of contrast, § 290dd-2(c) expressly prohibits the use of matter protected by § 290dd-2(a) from being used in any criminal investigation or proceeding. No similar provision prohibits such use in a civil proceeding. Other than this exclusion from use in criminal proceedings, the only penalty provided for in the statute is a fine See § 290dd-2(f).

Because Congress has not seen fit to expressly provide for exclusion in a civil case, this Court declines to read that requirement into the statute.

For a similar reason, the court declines to read the statute to prohibit an employer from relying upon information obtained in violation of § 290dd-2. The only case which has

addressed prior disclosed material pursuant to the § 290dd-2 or its predecessor statute did so under circumstances in which the "discloser" and the "disclosee" were part of the same entity. Jeanette "A" v. Condon, 728 F. Supp. 204, 205-05 (S.D. N.Y. 1989) (enjoining discipline of police officer by a police department where the discipline was based on wrongful disclosure of urinalysis test conducted by the police department alcohol counseling program; basing conclusion on department's wrongful disclosure). In the instant case, Defendant and the disclosure are different entities. The court concludes that an employer who relies on a disclosure from another entity regarding an employee's alcohol or drug use should be permitted to prove that the disclosure occurred and that the employer relied on the disclosure. Moreover, Plaintiff seeks to argue that Defendant lacked sufficient evidence to establish that she was a "direct threat" to her patients. There is nothing in § 290dd-2 that would justify the conclusion that Plaintiff can exclude from evidence a report that the Defendant allegedly relied upon in determining that Plaintiff was a direct threat. Even if § 290dd-2 did apply to previously disclosed material, the court fmds that it is likely that Defendant could show that there is good cause pursuant to § 290dd-2(b)(2)(C) to disclose such information. Plaintiff has requested that she be reinstated to her employment as a doctor in Defendant's employ. As such, the "the public interest and need for disclosure [of Plaintiffs] medical is great." State Board of Medical Examiners v. Fenwick Hall, Inc., 308 S.C. 477, 480, 419 S.E.2d 222, 224 (1992) (addressing disclosure pursuant to predecessor statute to § 290dd-2 where board of medical examiners sought records in order to determine if doctor was practicing under the influence of drugs; "The Board... . . argues that it is virtually impossible to conceive of a situation which would pose a greater threat to life or serious bodily harm than a physician practicing under the influence of drugs. We agree. It is imperative that there be no impediments which could cloud a physician's judgment."). Of course, any disclosure should be

done in such a way as to minimize the risk that persons outside of the review process would be gain access to the records.

The court also finds that Illinois law does not bar this evidence. Section 8-802 states: "No physician, surgeon, psychologist, nurse, mental health worker, therapist, or other healing art practitioner... . . shall be permitted to disclose any information he or she may have acquired in attending any patient in a professional character, necessary to enable him or her professionally to serve the patient, except only . . (3) with the expressed consent of the patient... . . ,(4) in all actions brought by the patient. . . wherein the patient's physical or mental condition is an issue (in which instance the patient shall be deemed to have waived all privileges relating to physical or mental condition)." While Plaintiff correctly points out that there is no evidence that Plaintiff expressly consented to the disclosure of any information and, thus, that exception (3) does not apply, Plaintiff ignores exception (4): action brought by patient in which patient's health condition is at issue. Here, Plaintiff has raised the claim that she was terminated and lost her credentials because she was perceived as an alcoholic; one of Defendant's defenses is that it reasonably believed that Plaintiff was a direct threat to her patients. The most recent pronouncement of the Illinois Supreme Court states that, where, as here, a plaintiff raises a claim and then seeks to use the privilege to bar evidence that "has the potential to completely absolve defendants from any liability," the privilege gives way and the materials should be disclosed, D.C. v. S.A., 178 Ill. 2d 551, 569, 687 N.E.2d 1032, 1041 (1997) ("In this case, the interests of fundamental fairness and substantial justice outweigh the protections afforded the therapistrecipient relationship where plaintiff seeks to utilize those protections as a sword rather than as a shield to prevent disclosure of relevant, probative, admissible, and not unduly prejudicial evidence that has the potential to fully negate the claim plaintiff asserted against

defendants and absolve them of liability."). The court finds that this case fits within the D.C. v. S.A. exception to the doctor-patient privilege and, thus, finds that § 8-802 does not bar the medical evidence in this case.

Finally, Plaintiff's hearsay arguments fail because the medical records, and, in particular, Feldman's statements and letter, are not being offered for the truth of the matter asserted but, instead, are being offered to show the reasonability of Defendant's actions. Fed. R. Ev. 801.

III. Summary Judgment Standard

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); Cox v. Acme Health Serv., Inc., 55 F.3d 1304, 1308 (7th Cir. 1995). A genuine issue of material fact exists for trial when, in viewing the record and all reasonable inferences drawn from it in a light most favorable to the non-movant, a reasonable jury could return a verdict for the non-movant. Anderson v. Liberty Lobby. Inc., 477 U.S. 242,248, 106 S. Ct. 2505,2510 (1986); Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 931 (7th Cir. 1995). The movant has the burden of establishing that there is no genuine issue of material fact. Celotex Corp. v. Catrett. 477 U.S. 317, 323, 106 S. Ct. 2548, 2553 (1986); Hedberg v. Indiana Bell Tel. Co., 47 F.3d 928, 931 (7th Cir. 1995). If the movant meets this burden, the non-movant must set forth specific facts that demonstrate the existence of a genuine issue for trial. Fed. R. Civ. P. 56(e); Celotex, 477 U.S. at 324, 106 S. Ct. at 2553. Rule 56(c) mandates the entry of summary judgment against a party "who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and in which that party will bear the burden of proof at trial,"

Celotex, 477 U.S. at 322, 106 S. Ct. at 2552-53. A scintilla of evidence in support of the non-movant's position is not sufficient to oppose successfully a summary judgment motion; "there must be evidence on which the jury could reasonably fmd for the [non-movant]." Anderson, 477 U.S. at 250, 106 S. Ct. at 2511.

On cross-motions for summary judgment, each movant must individually satisfy the requirements of Rule 56. Proviso Association of Retarded Citizens v. Village of Westchester, 914 F. Supp. 1555, 1560 (N.D. Ill. 1996); Chicago Truck Drivers, Helpers and Warehouse Workers Union (Ind.) Pension Fund v. Kelly, 1996 WL 507258, *3 (N.D. Ill. 1996). Thus, the traditional standards for summary judgment still apply even though both parties have moved for summary judgment. Blum v. Fisher and Fisher, Attorneys at Law, 961 F. Supp. 1218, 1222 (N.D. Ill. 1997). The Court thus considers the merits of each cross-motion separately and draws all reasonable inferences and resolves all factual uncertainties against the party whose motion is under consideration. Chicago Truck Drivers, 1996 WL 507258 at *3 This "Janus-like perspective. sometimes forces the denial of both motions," but only where there are material facts in dispute. Buttitta v. City of Chicago, 803 F. Supp. 213, 217 (N.D. Ill. 1992), aff'd, 9 F.3d 1198 (7th Cir. 1993).

IV. Analysis

A. ADA

The threshold requirement for the ADA is that the person claiming protection be a "qualified individual with a disability." 42 U.S.C. § 12132. Knapp v. Northwestern Univ., 101 F.3d 473, 478 (7th Cir. 1996) (stating that plaintiff claiming discrimination under the Rehabilitation Act must show that he or she suffers from a disability as defined by the Act), cert. denied, --- --- U.S. --- ---, 117 S. Ct. 2454 (1997);

Homeyer v. Stanley Tulchin Assoc., Inc., 91 F.3d 959, 961 (1996) ("An ADA plaintiff must suffer from a 'disability' as defined in the Act in order to invoke the Act's protection."). "Individual with a disability" as defined in ADA is "any person who (i) has a physical . . . impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment." 42 U.S.C. § 12102. The ADA includes two different claims of discrimination:

(1) "discrimination. . . by failure to make reasonable accommodations for known disabilities" and (2) "disparate treatment as between disabled and nondisabled employees." Tomasello v. Delta Air Lines, Inc., 8 F. Supp. 2d 1090, 1092 (N.D. Ill. 1998). Plaintiff appears to be arguing both claims in the alternative, i.e., that she was terminated because she was perceived as disabled (disparate treatment) and that she was discriminated against because Defendant refused to adopt her suggested accommodation, namely daily testing. The court finds that both claims fail.

1. "Qualified person with a disability"

The parties spend a great deal of time arguing over whether Plaintiff is a "qualified person with a disability." The court finds that Plaintiff has proffered sufficient evidence on the question of whether she is an "individual with a disability" under the third definition (is perceived as having a disability) because Plaintiff has proffered statements by Weis (the relevant decisionmaker) tending to show that he perceived her as disabled, i.e., an alcoholic incapable of working as a doctor. Several courts have held that alcoholism is or may be a "disability" under the ADA or the Rehabilitation Act. Miners v. Cargill Communications, Inc., 113 F.3d 820, 823 n .5 (8th Cir.) ("[A]lcoholism qualifies as a disability for the purposes of the ADA."), denied, --- U.S. —, 118 S. Ct. 441 (1997); Newland v. Dalton, 81 F.3d 904,

906 (9th Cir. 1996) ("Alcoholism is a recognized handicap.") (applying Rehabilitation Act). See also Maddox v. University of Tennessee, 62 F.3d 843, 846 (6th Cir. 1995) (assuming that alcoholics are "individuals with a disability" under the Rehabilitation Act). Additionally, where, as here, an employer has offered an employee "the choice between entering a chemical-abuse treatment program or being fired," it is reasonable to conclude that the employer regarded the employee as disabled by chemical dependence. Miners, 113 F.3d at 823-24.fn15

Much of the parties' disagreement focuses on whether Plaintiff was "qualified." This question is because of an issue of burden of proof. Plaintiff has the burden of proof to show that "she was a 'qualified' individual with a disability, meaning that she could perform the job either with or without reasonable accommodations." DePaoli v. Abbott Laboratories, 140 F.3d 668, 674 (7th Cir. 1998). As Plaintiff recognizes, the ADA provides a possible defense for Defendant:

namely, that an employer may apply as a "qualification standard... . that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. §12113(b). The question is whether Plaintiff has the burden of showing that she was not a direct threat (i.e., that she met the standard of not posing a direct threat), or whether Defendant has the burden of showing that Plaintiff was a direct threat. Some courts have treated the "no direct threat" standard as a "qualification standard" that a plaintiff must establish in order to show that she is "qualified," while others have placed the burden of proof on the defendant to show that the plaintiff was a direct threat. Compare Equal Employment Opportunity Commission v. Amego, Inc., 110 F.3d 135, 144 (1st Cir. 1997) ("We hold that, in a Title I ADA case, it is the plaintiffs burden to show that he or she can perform the essential functions of the job, and is

therefore 'qualified.' Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others.") with Rizzo v. Children's World Learning Centers, Inc., 84 F.3d 758, 764 (5th Cir. 1996) ("As with all affirmative defenses, the employer bears the burden of proving that the employee is a direct threat") (citing Interpretive Guidance to 29 C.F.R. § 1630.15(b) & (c)). This court finds that First Circuit's analysis in Amego to be persuasive at least where the "essential job functions" of a plaintiff's job "necessarily implicate the safety of others," the plaintiff has the burden of proof to demonstrate that she can safely perform her job without endangering the health or safety of others. fn16

A "direct threat means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." 29 C.F.R. § 1630.2(r). "The determination of whether an employee poses a 'direct threat' shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgment that relies on the most current medical knowledge and/or the best available objective evidence." Id. The assessment should look include at least four factors: "(1) the duration of the risk; (2) the nature and severity of the potential harm; (3) the likelihood that the potential harm will occur; and (4) the imminence of the potential harm." Ultimately, in this case, the burden of proof may be less important, as the evidence indicates that "an individual assessment" of Plaintiffs ability to perform provides ample evidence that Plaintiff was a direct threat to patient's health or safety. The record demonstrates that several people smelled alcohol on Plaintiff at work or in her work area on multiple occasions. Some individuals testified that Plaintiff's eyes appeared glassy when she smelled of alcohol.

Additionally, the events of 1996 were not isolated but were preceded by incidents in 1990 and in 1995 when Plaintiff had smelled of alcohol. It is undisputed that in 1995 when Defendant first addressed Plaintiff's alcohol situation, that one of the conditions that her doctor placed upon her was that she was not to consume mood-altering drugs, including alcohol and it is also undisputed that Plaintiff began drinking alcohol at the end of the random testing period in mid-1995. Thus, Plaintiff's situation involves a long duration with no clear ending point in sight. Plaintiff does not dispute that a doctor under the influence of alcohol could cause serious harm to a patient. The number of reports of Plaintiff smelling like alcohol and appearing to be dazed or having glassy eyes was substantial, and the number of occasions seemed to be increasing, thus increasing the likelihood of harm and the imminence of that harm. These facts are sufficient for Defendant to show that Plaintiff was reasonably likely to be a direct threat to her patients. Fn17 See Amego 110 F.3d at 147 ("[W]here no evidence of differential treatment, discrimination, or stereotyping is proffered, the employer's judgment is entitled to some weight.").fn18

Plaintiff seeks to show that she was not a direct threat by reference to several facts. First, she reminds the court that all of her performance reviews considered her to meet professional standards. She also points out that there is no evidence that, prior to her suspension and ultimate termination, she actually made any poor medical judgments. But, the direct threat assessment looks to an employee's present ability and whether the employee is likely to cause future harm. There is no requirement that the employee have actually caused harm in the past, or that the employee's performance be substandard prior to the present time. Second, Plaintiff challenges the reasonableness of assessment of her as a direct threat on the grounds that there was no "objective evidence" in support of that assessment. This challenge is based on two points: (1) that there is no test data

showing that Plaintiff was under the influence of alcohol at work and, more specifically, there were no tests done on Plaintiff on the days when co-workers and patients state that she smelled like alcohol and (2) that no doctor conducted a full medical examination of Plaintiff prior to her termination and that Feldman, in particular, did not conduct a full medical examination.fn18 However, by its very terms § 1630.2(r) does not require medical tests; rather the direct threat assessment must rely on "the most current medical knowledge and/or the best available objective evidence," The Tenth Circuit recently determined that an employer had sufficient "objective evidence" to find that a person was a "direct threat" to members of the community where the employer had evidence that the person had made threats against people and had engaged in violent behavior. Den Hartog v. Wasatch Academy, 129 F.3d 1076, 1090 (10th Cir. 1997). In the face of that evidence, the employer was not required to have an independent medical examination conducted in order to make its individual assessment that the person was a direct threat. Id. Similarly, Defendant has proffered evidence that shows that Plaintiff smelled like alcohol while on duty and otherwise appeared to be under the influence of alcohol, e.g., bad glassy eyes when she smelled like alcohol. In the face of that evidence, the court finds that Defendant has shown sufficient objective evidence to satisfy § 1630.2(r). Third, Plaintiff argues that she would not be a "direct threat" if the accommodation of daily testing was used. This is also the undergirding argument for her reasonable accommodation claim.

The court finds that Defendant was not required to adopt Plaintiff's suggestion of daily testing. As the Seventh Circuit has stated, "The employer has at least some responsibility in determining the necessary accommodation" but "the regulations envision an interactive process that requires participation by both parties." Beck v. University of Wisconsin Board of Regents, 75 F.3d 1130, 1135 (7th Cir.

1996). There are limits, however, to how far the employer must go in accommodating an employee. Vande Zande v. State of Wisconsin Dept. of Administration, 44 F.3d 538, 543 (7th Cir. 1995) ("The employee must show that the accommodation is reasonable in the sense both of efficacious and of proportionality to costs." Even if this prima facie showing is made, the employer has an opportunity to prove that upon more careful consideration the costs are excessive in relation either to the benefits of the accommodation or to the employer's financial survival or health."). Here, the evidence tends to show that daily testing could determine whether she was under the influence of alcohol. However, Plaintiff has not shown that daily testing addresses several key problems. First, daily testing can not determine if a person has used alcohol after the time of testing. For example, if Defendant tests Plaintiff as soon as she came to work, Plaintiff could still be capable of treating patients while under the influence if she drank while at lunch or when unobserved. This is compounded by the undisputed facts that Defendant's clinic is sometimes staffed by only one doctor -- thus increasing the risk of unobserved drinking and also limiting Defendant's options if Plaintiff is found on a given day to be under the influence of alcohol — and that Plaintiff would be required several times a year to be on call for twenty-four hour periods. Defendant cannot be expected to monitor Plaintiff 24 hours a day in those situations. Brennan v. New York City Police Department, 1997 WL 811543, *6 (S.D.N.Y. 1997) (rejecting alcoholic plaintiff's ADA claim; "Plaintiff's proposed accommodation — continued EAP monitoring with reinstatement to perform at full duty status —does not render him qualified, as it does not address the threat that plaintiff poses. Police officers must be able to respond to any situation, armed, at all times. Plaintiff might face an emergency at odd hours, calling for imnmediate response. EAP cannot effectively monitor plaintiff on the spot, 24 hours a day."). Additionally, Defendant argues that Plaintiff's proposed accommodation is unreasonable in terms

of the burden that it would place on Defendant to monitor her testing, both because of the awkwardness of having Plaintiffs co-workers testing her, but also because of the undisputed fact that Plaintiff would at times be on duty (either at the clinic or while on-call) without co-workers being on duty to monitor her testing. Plaintiff argues that this problem could be ameliorated by hooking up a Breathalyzer to a computer system. Beyond the fact that Plaintiff's only proffered evidence regarding the feasibility of that option is inadmissible hearsay, no evidence indicates whether self-testing (even with the computer) is actually reliable or whether such tests are circumventable. Without such evidence, the court will not fmd that daily testing, particularly self-testing, is a reasonable accommodation. See Altman v. New York City Health and Hospitals Corp., 903 F. Supp. 503, 5 10-11 (S.D.N.Y. 1995) (rejecting recovering alcoholic's suggested accommodation of permitting him to remain hospital Chief of Medicine while maintaining "periodic urine testing, and 'professional monitoring' in the workplace."; noting difficulties in monitoring, including the risk that co-workers would not come forward with suspicions), cert. denied, 100 F.3d 1054 (2d Cir. 1996). Even if Plaintiff's suggested accommodation was reasonable, contrary to Plaintiffs argument, "[a] employer is not obligated to provide an employee the accommodation he requests or prefers, the employer need only provide some reasonable accommodation." Gile v. United Airlines. Inc., 95 F.3d 492, 499 (7th Cir. 1996). The requirement of prospective treatment for alcoholics and other drug users is a reasonable accommodation. Office of Senate Sergeant at Arms v. Office of Senate Fair Employment Practices, 95 F.3d 1102, 1104 (Fed. Cir. 1996) (rejecting board decision that employer should have included "retroactive accommodations" for alcoholic employee rather than requiring treatment); Williams v. Houston Lighting & Power Co., 980 F. Supp. 879, 881, 883 (S.D. Tex. 1997) (upholding termination where plaintiff, who had been diagnosed as an

opiod user, refused to sign a return to work agreement" which required that the plaintiff abstain from all "mind altering chemicals," undergo alcohol and drug testing, meet with a counselor, and agree to other conditions in the case that she was terminated). But see Miners, 113 F.3d at 825 ("[A]llowing an employer to require an employee it only suspects of being an alcoholic to enter treatment places the employee between the Scylla of entering an unnecessary chemical treatment program, with all of the associated personal costs and its stigmas, and the Charybdis of losing her job."; finding no reasonable accommodation). Where, as here, an employer has evidence that an employee was under the influence of alcohol while on the job, particularly where the employee has been diagnosed as being an alcohol abuser, a "return to work" agreement including the requirement of treatment for alcohol abuse is reasonable. Williams. 980 F. Supp. at 884.

Accordingly, the court finds that Plaintiff was not a "qualified individual with a disability" under the ADA and, therefore, GRANTS Defendant's motions for summary judgment as to Count I of Bekker 1 (ADA) and as to Bekker II and DENIES Plaintiff's motion for summary judgment in its entirety.

2. Legitimate, nondiscriminatory justification

Even if Plaintiff had shown that she was a qualified individual with a disability, the court finds that Defendant has offered a legitimate, nondiscriminatory justification for its actions. An employer may discharge an alcoholic employee for misconduct that it would not tolerate from "a sober employee or, for that matter, an intoxicated but non-alcoholic employee." Maddox v. University of Tennessee, 62 F.3d 843, 847 (6th Cir. 1995). See also Despears v. Milwaukee Coui~ty, 63 F.3d 635, 636-37 (7th Cir. 1995) (upholding discharge of alcoholic employee whose driver's license had

been revoked for driving under the influence of alcohol); Johnson v. New York Hospital, 96 F.3d 33, 34 (2d Cir. 1996) (same); Newland, 81 F.3d at 906 (upholding discharge of employee who, while under the influence of alcohol, attempted to fire an assault weapon inside, a bar); Ljttle v. Federal Bureau of Investigation, I F.3d 255, 257-59 (4th Cir. 1993) (upholding discharge based on conduct of alcoholic plaintiff who had been intoxicated while on duty); Taub v. Frank, 957 F.2d 8, 10 (1st Cir. 1992) (upholding discharge of employee who had distributed drugs). An employer may discharge an employee for conduct even where that conduct is related to or caused by the employee's disability. Jd~ But see Teahan v. Metro-North Commuter Railroad Co., 951 F .2d 511, 517 (2d Cir. 1991) (holding that termination for conduct "shown to be caused by substance abuse" is termination based on the disability of substance abuse). Defendant was justified in terminating Plaintiff for being on duty while smelling of alcohol because the reports given to Defendant by Plaintiff's patients and co-workers provided a sufficient justification for a finding that Plaintiff was on duty while under the influence of alcohol. There is no evidence that Defendant would have refrained from discharging a non-alcoholic employee whom Defendant reasonably believed to have been under the influence while on duty. Additionally, this court finds that, Defendant had a compelling reason to require Plaintiff to sign a return-to-work agreement after Defendant received notice that Plaintiff had smelled of alcohol while on duty. Defendant's reason became even more compelling once it received a diagnosis from Feldman that diagnosed Plaintiff has an alcohol abuser. Williams, 980 F. Supp. at 884. Without commenting on all of the provisions of the return-to-work agreement, Defendant could at least have required Plaintiff to get treatment, to refrain from consumption of mood altering drugs, to submit to testing, and to agree to consequences for failure to comply. Id. at 881, 884. There is no evidence that Plaintiff agreed to all of those elements of the December 6 contract. Plaintiff also has

offered no evidence of pretext, that Defendant was not sincere in its belief that she was a risk to her patients and its belief that she bad smelled of alcohol while on duty, or that Defendant gave or would give preferential treatment to a non-alcoholic employee who engaged in the same conduct as Plaintiff. Accordingly, summary judgment is GRANTED on Defendant's motions for summary judgment as to Bekker I Count I (ADA) and as to Bekker II and DENIED as to Plaintiff's motion for summary judgment as to Bekker 1.

B. Breach of contract

It is undisputed that Plaintiff's employment contract stated that she could be terminated if "PLAN [Defendant] or any applicable state or federal regulatory agency reasonably believes that the health and safety of patients is endangered by PHYSICIAN [Plaintiff]." As the above analysis shows, Defendant has shown that it reasonably believed that the health and safety of patients was endangered by Plaintiff. Accordingly, Defendant's motion for summary judgment as to Bekker II Count II (breach of contract) is GRANTED.

V. Conclusion

For the foregoing reasons, For the following reasons, Defendant's motions for summary judgment in Bekker I and Bekker II are GRANTED, Plaintiff's motion for summary judgment is DENIED, and Plaintiff's motion to strike/motion in limine is DENIED. This case is CLOSED.

David H. Coar
United States District Judge

Dated: December 21, 1998

fn1 Bekker I and Bekker II have been consolidated.

fn2 Plaintiff voluntarily dismissed Count III (retaliatory discharge in contravention of Illinois public policy) in her responsive memorandum in Bekker I.

fn3 In order to minimize confusion over citation to the record, the court will refer to the following documents, most from Bekker I: Dft's 12(M) Stmt., Ptf's 12(M) Resp., and Dft's 12(M) Reply (all relating to Defendant's motion for summary judgment); Ptf's s 12(N) Stmt. and Dft's 12(N) Resp. (both relating to Defendant's motion for summary judgment); Ptf's 12(M) Stmt. and Dft's 12(M) Resp. (both relating to Plaintiffs motion for summary judgment). Ptf's 12(M) Stmt. of Additional Facts is the same as Ptf's 12(N) Stmt. and, thus, will not be cited in this opinion. Because the court has decided that Defendant merits summary judgment on the ADA issues, the court need not address the issue of whether Plaintiff's credentials are "terms and conditions" of her employment and need not consider most of the extra facts stated in Bekker II.

fn4This is one of several statements that Plaintiff alleges as hearsay. Such statements are not being admitted for the truth of the matter asserted but, instead, to demonstrate what evidence that Defendant had in its possession at the time that it made its decisions to terminate Plaintiff and to rescind her credentials. Accordingly, all such statements are admissible and, where Plaintiff has not raised any other objections in her 12(M) Response, shall be deemed admitted.

Fn5Plaintiff argues that the cited support, her deposition, is based on inadmissible hearsay. (Ptf's 12(M) Resp. ¶ 14.) However, Plaintiff stated in her deposition that she was aware of "Dr. Feldman's reputation in the medical community" and "that he is regarded as a specialist in the subject of alcohol abuse" and "substance abuse" "particularly . . . with regard to physicians. (Dft Ex. A at 43-44.) This is sufficient basis for reputation testimony.

fn6 In the end, this fact is not determinative. The court agrees with Defendant that the standard is whether Defendant had reliable information that Plaintiff smelled of alcohol at work not conclusive information.

Fn7Plaintiff objects to Dft's 12(M) Stmt. ¶¶ 35-37 on the ground that they are based on Defendant's Interrogatory Response 5. (Ptf's 12(M) Resp. ¶¶ 35-37 ("Defendant's self-serving interrogatory answers, prepared by counsel, are not admissible evidence to establish the statement."). This ignores the fact that answers to interrogatories are admissible in summary judgment motions. Additionally, as noted by Defendant, Ernest Weis, Defendant's Vice President and Medical Director, attested to the truth and correctness of the answers to interrogatories. Plaintiff has not otherwise disputed these statements, and the court finds that they are admissible. Moreover, Defendant has the right to establish whatever job qualifications it wants so long as those requirements do not violated the law. Plaintiff has not (and cannot) argue that requiring physicians to refrain from smelling of alcohol violates any statutory prohibition.

fn8 Plaintiff objects to this statement on a number of grounds: that Weis allegedly told her that be was not sure that he had cause for termination, (Dft. Ex. A (Ptf's Dep.) at 99), that Dusek and Wozniak had not discussed whether there was cause for termination, (Dft. Ex B (Dusek Dep.) at 142), and that the letter to Plaintiff dated December 6, 1996 is hearsay. (Ptf's 12(M) Resp. ¶38.) However, Weis did testify that he believed that he did have cause when he wrote the letter. (Dft. Ex. C (Weis Dep.) at 265). Regardless of whether one believes that Weis told Plaintiff that he was not that there was cause for termination, Weis's deposition testimony supports the statement that Weis believed on December 6, 1996, that he had legal cause to terminate Plaintiff.

fn9 Plaintiff also states: "The conditions that defendant imposed on plaintiffs continued employment during the December 6 meeting are not conditions imposed by defendant on other employees that defendant does not perceive as suffering from alcoholism or other substance abuse." (Ptf's 12(M) Stmt. ¶ 48.) However, Plaintiff does not cite to any supporting materials. Accordingly, this statement is not considered on summary judgment. Local Rule 12(M).

fn10 Feldman's statements regarding this visit are at issue in Plaintiffs motion to strike.

fn11 Defendant objects to this statement on the ground that Plaintiff did not include a copy of her deposition (the cited support) with her summary judgment motion. However, Defendant included a copy of Plaintiff's deposition (actually, three copies), which are part of the record.

fn12 Plaintiff states that her attorney faxed a letter to Weis's fax machine addressed to Dusek. (Ptf's 12(M) Resp. ¶ 51.) However, Dusek testified that she received no contact from Plaintiff and that Weis did not inform Dusek that he'd received any letter from an attorney representing Plaintiff. (Dft. Ex. B (Dusek Dep.) at 200.)

fn13The cited supporting materials, contrary to Defendant's arguments, do support this claim. However, the questions and answers at issue involve evaluations of Plaintiff on matters other than her alleged alcohol use, e.g., was she actually making good medical decisions, etc. For example, in Weis's deposition, he was asked whether "by all internal measures, Dr. Bekker was, other than people claiming to have smelled alcohol on her, one of Humana's better doctors?" (Dft. Ex. C (Weis Dep.) at 242.) While Defendant might have a stronger case if there was evidence of poor patient care, Defendant does not need such evidence to justify its decision.

fn14 Plaintiff cites this provision as 42 U.S.C. § 290dd-3. However, several provisions, including § 290dd-3, were recodified as part of § 290dd-2. The case law under § 290dd-3 is still applicable, and the court will consider Plaintiffs argument pursuant to the proper provision.

fn15The letter from Feldman stating that Plaintiff "is currently sustaining severe professional consequences as a result of her drinking" and recommending that Plaintiff ought not be permitted to work as a doctor at least raises the possibility that Plaintiff was actually disabled in her major life activity of work. However, the court need not rule on whether there is sufficient evidence to show an actual disability (particularly as Plaintiff does not concur with Feldman's diagnosis and recommendation or with the means by which he reached that diagnosis) because Plaintiff has successfully offered sufficient evidence to show that she was perceived as disabled.

fn16Alternatively, this test could be viewed as requiring a shifting burden of proof, such that the defendant has the initial burden of proffering sufficient evidence to put the "direct threat" issue into question. This burden would be satisfied by showing (1) that a given characteristic or activity is likely to put the health or safety of people at a substantial risk and (2) that there is a reasonable likelihood that the plaintiff has that characteristic or will engage in that conduct. Once that burden is met, summary judgment in favor of the defendant is appropriate unless the plaintiff successfully disputes (via admissible evidence) either the claim that the characteristic or activity is likely to put the health or safety of people at risk or the claim that s/he has that characteristic or is reasonably likely to engage in that conduct in the future. Under either the Amego approach, of the shifting burden approach, the facts of this case require the plaintiff to demonstrate that she did not pose a direct threat.

fn17 Rizzo points out that the determination of whether an employee poses a direct threat "is a complicated, fact intensive determination, not a question of law" and states that a defendant must show on summary judgment that the plaintiff "is a direct threat as a matter of law." 84 F.3d at 164. This court's decision comports with Rizzo by stating that, where, as here, there is evidence supporting the reasonable conclusion that a doctor was under the influence of alcohol while on duty, that doctor posed a direct threat to her patients.

Fn18 Other than Plaintiff's speculation, there is no evidence of discrimination, stereotyping, or differential treatment. Plaintiff has offered no evidence tending to show that Defendant would have permitted a non-alcoholic employee to remain on its staff under more lenient terms where that employee had been on duty smelling of alcohol.

fn18 One interesting aspect of this particular challenge is that most of the reports were significantly after the fact because co-workers did not report Plaintiff immediately upon smelling the odor that they thought was alcohol. There is no evidence that Defendant had sufficiently timely notice to permit testing on those days. Under Plaintiffs argument. Defendant would have to ignore untimely reports that she smelled like alcohol on a given day while on duty because testing her on that day was no longer possible. However, Plaintiff has offered no case law requiring a blood or Breathalyzer test to show that a person was under the influence of alcohol.

Nos. 97C4643

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEPHANIE BEKKER,

v.

HUMANA HEALTH PLAN, INCORPORATED,

December 21, 1998

JUDGMENT

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the defendants' motions for summary judgment are granted. Plaintiff's Motion for Summary Judgment is Denied. Plaintiff's Motion to Strike! Motion in Limine is denied. This case is closed.

Michael W. Dobbins, Clerk of Court

Date: 12/21/1998

Nos. 97C6771

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

STEPHANIE BEKKER,
Plaintiff

v.

HUMANA HEALTH PLAN, INCORPORATED,
Defendant.

December 21, 1998

- Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the defendants' motions for summary judgment arc granted. Plaintiffs Motion for Summary Judgment is Denied. Plaintiff's Motion to Strike/Motion in Limine is denied. This case is closed.

Michael W. Dobbins, Clerk of Court

Date: 12/21/1998

Nos. 99-1215 & 99-1218

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

STEPHANIE BEKKER,
Plaintiff-Appellant,

v.

HUMANA HEALTH PLAN, INCORPORATED,
Defendant-Appellee.

November 14, 2000, Decided

JUDGES: Before Hon. RICHARD A. POSNER, Circuit Judge, Hon. FRANK H. EASTERBROOK, Circuit Judge, Hon.

KENNETH F. RIPPLE, Circuit Judge.

OPINION: ORDER

Upon consideration of the Plaintiff-Appellant's petition for rehearing en banc, filed on October 23, 2000, no judge in active service has requested a vote thereon and the judges on the original panel have voted to deny the petition. Accordingly,

IT IS ORDERED that the petition for rehearing en banc is hereby DENIED.

Supreme Court, U.S.
FILED
MAR 15 2001
OFFICE OF THE CLERK

No. 00-1294

IN THE

Supreme Court of the United States

STEPHANIE BEKKER,

Petitioner,

v.

HUMANA HEALTH PLAN, INCORPORATED,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

MICHAEL G. CLEVELAND
Counsel of Record
RICHARD H. SCHNADIG
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
222 N. LaSalle Street
Suite 2600
Chicago, Illinois 60601
(312) 609-7500

Attorneys for Respondent

165810

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent, Humana Health Plan, Incorporated, is a wholly owned subsidiary of Humana, Inc. No publicly held company owns 10% or more of the stock of Humana, Inc.

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STATEMENT OF THE CASE

A. Statement of facts

Bekker is a licensed medical doctor. She was employed by Humana Health Plan, Incorporated, a health maintenance organization, as an internist in its Lincoln Park Center. She worked weekdays and every other Saturday. On occasion, Bekker was the only physician present at the Center. She also had on-call responsibilities, which required her to work twenty-four hour shifts three to five times per month (Pet. App. 2a, 22a).

In 1990, a nurse informed Dr. Thomas, the Clinical Director for the Center, about a rumor that Bekker smelled of alcohol. Thomas discussed the rumor with Bekker, and they concluded that the odor may have been caused by Bekker's mouthwash (Pet. App. 2a).

In 1995, a patient complained that she had smelled alcohol on Bekker during her appointment. At Humana's request, Bekker had an independent medical evaluation by Dr. Paul Feldman at Rush Presbyterian-St. Luke's Medical Center. Feldman is a specialist in alcohol and substance abuse, particularly with respect to physicians (Pet. App. 3a).

Feldman did not diagnose alcohol abuse or dependence but found that "there are indicators suggestive of problematic alcohol usage," including a report from a physician who worked with Bekker that he had smelled alcohol on her breath on three or four occasions in the past five years, two of which had occurred in the past four months. Feldman recommended that for a year Bekker remain abstinent from alcohol and have monthly random urine testing, to which Bekker agreed.

Bekker was tested thirteen times, and all her tests were negative. After the testing period ended, Bekker resumed drinking (Pet. App. 3a).

In November 1996, another patient complained that Bekker smelled of alcohol during her appointment. Diane Dusek, Humana's Director of Risk Management and Employee Health Services, was advised of the complaint and began an investigation. Dusek spoke with the patient, who was a substance abuse counselor; the patient confirmed that Bekker had smelled of alcohol during her November 1996 visit and added that she may have also smelled alcohol during an earlier appointment as well (Pet. App. 3a-4a).

On November 26, 1996, Dusek telephoned Bekker, who had been suspended with pay pending the results of the investigation, for her account of the situation. Bekker denied using alcohol before or during scheduled work hours or when on-call. The next day Bekker called Dusek and offered three possible reasons for her smelling of alcohol: her Bonnie Bell face wash, her air freshener and her recycling of beer bottles which she claimed to have found while walking her dog in the morning near Wrigley Field (Pet. App. 3a-4a).

Dusek also spoke with staff members who worked with Bekker at the Lincoln Park Center. A medical assistant reported that she had smelled alcohol on Bekker at least once a week, that Bekker had glassy eyes when the odor was present and that patients and other employees had commented about the odor. A nurse told Dusek that she had smelled alcohol on Bekker two to three times a week during the period of time she worked with Bekker and that patients had made comments to her about Bekker or Bekker's examination room smelling of alcohol. Another employee told Dusek that she

smelled alcohol on Bekker on at least a weekly basis, that when the odor was present Bekker's face appeared flushed and her eyes dilated and that a patient had made a comment about Bekker drinking. Two triage nurses also confirmed that they had smelled alcohol on Bekker and that other employees also talked about it. Center Manager Thomas told Dusek that approximately a week and a half before she had smelled an unusual odor on Bekker while at work and thought it might have been alcohol (Pet. App. 4a, 26a).

After being apprised of the results of Dusek's investigation, Dr. Ernest Weis, Vice-President and Medical Director for Chicago, decided that although Bekker could have been discharged he would continue her employment if she agreed to certain terms. Those terms were set forth in a December 6, 1996 letter and a Work Agreement and included the following: (1) submitting to a clinical evaluation, (2) attending any prescribed formal recovery program, (3) random testing by Employee Health Services for a two year period, (4) submitting all test results and treatment plans to Employee Health Services and (5) agreeing to advise any future employer of her condition if Bekker resigned during any treatment. Additionally, the letter and Work Agreement provided that any failure to comply with these terms could result in her discharge (Pet. App. 5a).

On December 6, 1996, Weis gave the letter and Work Agreement to Bekker and told her that he believed she had a drinking problem which required treatment. Bekker again denied drinking. Bekker declined to sign the Work Agreement, stating that she wanted to review it with legal counsel, but agreed to submit to an evaluation (Pet. App. 5a-6a).

Bekker was seen by Feldman on December 9, 1996. Feldman recommended that she check herself into a residential treatment program, which she declined to do. Feldman informed Dusek by telephone that he had made that recommendation to Bekker (Pet. App. 6a). Feldman subsequently sent a letter to Dusek on December 16, 1996 in which he wrōte that he believed that Bekker "meets criteria for alcohol abuse." He further wrote:

> [H]er health is clearly at risk, and she is currently sustaining severe professional consequences as a result of her drinking. Our recommendation at this point would be for Dr. Bekker to refrain from the practice of medicine and immediately enter a residential treatment program which has expertise in the care of chemically dependent healthcare professionals . . . . I feel it extremely important, both for Dr. Bekker and in the interest of patient care that she not return to the practice of medicine until she has completed treatment in a professional's program.

(Pet. App. 7a, 29a-30a)

On December 12, 1996, Weis sent a letter to Bekker informing her that if she did not accept the conditions by December 16, 1996 at 9:00 a.m., Humana would terminate her employment. Bekker did not agree and on December 17, 1996 Weis terminated Bekker's employment (Pet. App. 6a-7a).

B. The decision below

Bekker sued alleging that Humana discharged her because it perceived her to have a disability, alcoholism, in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101, *et seq.* ("ADA") (Pet. App. 2a). Following discovery, the District Court granted Humana's motion for summary judgment. The District Court noted that the ADA protects only qualified individuals with disabilities and provides that an employer may have as a qualification that an employee not "pose a direct threat to the health and safety of others in the work place." 42 U.S.C. § 12113(b). The District Court held that Bekker bore the burden of proving that she could safely perform her job without endangering the health and safety of others (Pet. App. 40a). Applying the criteria set forth the EEOC's Interpretive Guidance, 29 C.F.R. § 1630.2(r), the Court held that the evidence showed that she was "reasonably likely" to be a threat to her patients and that she had not produced any evidence that she was not and so was not a qualified disabled individual under the ADA (Pet. App. 40a-42a). The District Court further held that, even assuming Bekker had shown that she was a qualified individual with a disability, her claim still failed because there was no evidence that Humana was not sincere in its belief, based on reports by Bekker's patients and co-workers, that she had smelled of alcohol while on duty and was a threat to her patients and that there was no evidence that Humana would not have discharged a non-alcoholic employee in the same circumstances (Pet. App. 46a-48a).

The Seventh Circuit affirmed the District Court, stating that it had "no disagreement" with the District Court's analysis of the direct threat issue. The Seventh Circuit further

held: "Nevertheless, even assuming that Dr. Bekker is a qualified individual with a disability, Humana was justified in discharging her" (Pet. App. 13a). The Court concluded that Bekker had no direct evidence of discrimination, that Humana had ample evidence that Bekker was seeing patients under the influence of alcohol and that Humana would have discharged her for that reason regardless of whether it perceived her to suffer from alcoholism (Pet. App. 16a-17a). The Court also held that Bekker's claims failed under the burden shifting analysis of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), because, even assuming Bekker had made out a prima facie case, Humana had stated a legitimate nondiscriminatory reason for discharging her — its belief that she was seeing patients while under the influence of alcohol — and Bekker had not presented any evidence that reason was pretextual (Pet. App. 17a-18a).

REASONS FOR DENYING THE WRIT

A. The decision below rests on a separate independent ground not challenged by Bekker

Both of the reasons advanced by Bekker for granting the writ dispute the determination below that she was a direct threat to her patients and so not a qualified individual under the ADA. Bekker first argues that the determination that she bore the burden of proof conflicts with other appellate court decisions and other authority (Pet. 7-9). Bekker secondly contends that she could not be determined to be a direct threat without competent medical evidence and challenges the competency of the evidence to support that determination (Pet. 10-12).

As set out above, however, the Seventh Circuit, in addition to ruling against Bekker on the issue of direct threat, assumed that Bekker had succeeded in showing that she was not a direct threat and thus had shown herself to be a qualified individual with a disability under the ADA. The Court then held that Bekker's ADA perceived disability claim failed for a separate independent reason — Humana discharged her because it reasonably believed that she had been seeing patients while under the influence of alcohol and would have done so regardless of whether it perceived her to have a disability. Bekker ignores this holding of the Seventh Circuit and does not challenge it as being erroneous or urge its review by this Court.

This case thus does not present an issue appropriate for review by this Court. Even were it held that Bekker was not a direct threat and so was a qualified individual under the ADA, her discharge would still stand because of the unchallenged holding that she had not shown unlawful discrimination. So far from having potentially broad application, this Court's resolution in Bekker's favor of the issues urged by her would not even affect the outcome in her case since her discharge would still stand.

B. The decision below does not conflict with the decisions of other Courts of Appeals

Contrary to what Bekker asserts, there is no conflict in Circuits about whether the plaintiff or the defendant in an ADA case bears the burden of proof on the question of direct threat. Like the Seventh Circuit in this case, the other Courts of Appeals which have considered the issue have all held that it is the plaintiff's burden to prove that she is a not direct threat.

In *EEOC v. Amego, Inc.*, 110 F.3d 135, 144 (1997), the First Circuit held that where the safety of others is necessarily implicated by essential job functions, the plaintiff must demonstrate that she can perform those functions in a way that does not endanger others.[1] Likewise, in *Moses v. American Nonwovens, Inc.*, 97 F.3d 446, 447 (1996), the Eleventh Circuit held that "[t]he employee retains at all times the burden of persuading the jury . . . that he was not a direct threat."

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1. By taking language out of context and combining phrases which appear three paragraphs apart, Bekker seeks to create the misimpression that *Amego* holds the exact opposite. What the First Circuit actually wrote, with the language used by Bekker set off by brackets, was:

> The EEOC stakes out a position which is far-too broad. This is not a case [where a person who can perform all essential job functions nonetheless poses a risk to others]. The district court did not, we believe, commit error in considering risk posed to others under the category of "qualification," where the risk is expressly associated with performance of an essential job function.

Three paragraphs later the Court wrote:

> We hold that, in a Title I ADA case, it is the plaintiff's burden to show that he or she can perform the essential functions of the job, and is therefore "qualified." Where those essential job functions necessarily implicate the safety of others, plaintiff must demonstrate that she can perform those functions in a way that does not endanger others. There may be other cases under Title I where [the issue of direct threat is not tied to the issue of essential job functions but is purely a matter of defense, on which the defendant would bear the burden].

Bekker's reliance on the Fifth Circuit's decisions in *Rizzo v. Children's World Learning Centers, Inc.*, 84 F.3d 758 (5th Cir. 1996) (*Rizzo I*) and *Rizzo v. Children's World Learning Centers*, 173 F.3d 254 (1999), is inappropriate; for in a later decision, *Rizzo III*, not cited to the court by Bekker in her petition, the Fifth Circuit sitting en banc held that it was not necessary to address the direct threat burden of proof issue since it had been raised for the first time on appeal and so did not do so. *Rizzo v. Children's World Learning Centers, Inc.*, 213 F.3d 209, 213, *cert. denied*, 121 S. Ct. 382 (2000). Moreover, Bekker's claim that the earlier *Rizzo* decisions placed the burden of proof on the employer is wrong. In *Rizzo II*, the Fifth Circuit applying its prior decision in *Rizzo I*, expressly agreed with the Eleventh Circuit's decision in *Moses*. The Fifth Circuit held "the burden of proof is on the plaintiff to prove that, as a qualified individual, she is not a direct threat to herself or others" and explained that because the "qualification standard" imposed by 42 U.S.C. § 12113(b) "obviously goes to the issue of whether plaintiff is a 'qualified individual with a disability,' the burden of proof would apparently fall on the plaintiff." 173 F.3d at 258-59. *Rizzo II* recognized a limited exception that would shift the burden of proving direct threat to the employer only "when a court finds that the safety requirements imposed tend to screen out the disabled." 173 F.3d at 259-60. But contrary to what Bekker represents, *Rizzo II* makes that a qualifier to the general rule and not the rule itself. It is also a qualification not even arguably applicable here since a policy prohibiting employees from being under the influence of alcohol, or appearing to be, while on duty applies equally to social drinkers and alcoholics.

Finally, contrary to Bekker's suggestion that *Den Hartog v. Wasatch Academy*, 129 F.3d 1076, 1088 (1997), holds direct threat to be an affirmative defense to be proved by the employer (Pet. 9), the Tenth Circuit did not there consider the issue of

allocation of burden of proof at all. The court concluded, without discussing burden of proof, that the evidence established the existence of a direct threat and required summary judgment for the employer.

As for Bekker's contention that the decision below conflicts with the ADA itself, as shown, the Circuits are in agreement that it does not. Further, even if the EEOC Interpretive Guidance, on which also Bekker relies, might be read to support a contrary conclusion, it "does not carry the force of law and is not entitled to any special deference." *Sutton v. United Airlines, Inc.*, 130 F.3d 893, 899 (10th Cir. 1997), *aff'd*, 527 U.S. 471 (1999). And, as the Fifth Circuit pointed out in *Rizzo II*, the Guidance supports imposing the burden on the plaintiff in the ordinary case, with the limited exception (not applicable here) for cases where a safety requirement tends to screen out the disabled.

There is no conflict in the Circuits or with any other authority which would make consideration of this case by this Court appropriate.

C. The decision below does not conflict with decisions of this Court

Both the District Court and the Court of Appeals held that ample objective evidence supported the determination that Bekker was a direct threat — patient complaints that she smelled of alcohol in 1990, 1995 and 1996; employee reports that they regularly smelled alcohol on her, at least once a week or more, and that employees and patients had commented on it; and employee reports that when the odor was present, her face appeared flushed and her eyes were dilated. Contrary to Bekker's arguments, this Court's

decisions in *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987), and in *Bragdon v. Abbott*, 524 U.S. 624 (1998), do not hold that an employer may not rely on such objective evidence or hold that an employer must have medical evidence to support its conclusion that an employee is a direct threat.

In *Arline*, this Court held that in determining whether an employee was a direct threat, "courts normally should defer to the reasonable medical judgments of public health officials." 480 U.S. at 288. Pointedly, this Court did not hold, as Bekker incorrectly asserts, that the determination of whether an employee poses a "direct threat" should be "based on" such medical judgments (Pet. 10). In *Bragdon*, this Court held that in assessing an employee's present ability to safely perform the essential functions of the job, the employer may rely upon a reasonable medical judgment in light of the available medical evidence or other objective evidence. 524 U.S. at 650-51. The Court rejected the contention that the judgment of the defendant in that case, a dentist, was entitled to deference and acknowledged that employers might consult with and rely upon "physicians as objective third-party experts." 524 U.S. at 650. That is exactly what Humana did here. Neither *Arline* nor *Bragdon* hold that an employer is required to have medical opinions to support its direct threat determination where there is other objective evidence.

The decision below that objective evidence supported Humana's determination that Bekker was a direct threat to the safety of her patients is in accord with the decisions of other Courts of Appeals. *Den Hartog v. Wasatch Academy*, *supra*, 129 F.3d at 1090 (determination that individual with bipolar affective disorder was direct threat based on repeated

threats and demonstrated propensity to carry them out was "eminently reasonable"; no medical examination conducted). Also, EEOC's Interpretive Guidance expressly states that an employer is free to rely on objective evidence or reasonable medical judgment. 29 C.F.R. § 1630.2(r).

Bekker's reliance on *Miners v. Cargill Communications, Inc.*, 113 F.3d 820 (8th Cir. 1997), *cert. denied*, 118 S. Ct. 441 (1997), is entirely misplaced. There, the employer terminated an employee for refusing to enter a treatment program after she had been observed drinking alcohol prior to driving a company van. The Eighth Circuit rejected the employer's argument that its offer of treatment was a reasonable accommodation under the ADA, stating: "Had Cargill acted on its perception that Miners suffered from alcoholism by attempting to establish that she was an alcoholic and demonstrated performance problems related to her alcoholism, it might have been able to avail itself of the opportunity to accommodate Miner's disability." *Id.* at 825. Thus, *Cargill* holds only that the employer could not require the employee to undergo treatment prior to any assessment that such treatment was warranted. In contrast, Humana did not require Bekker to have an evaluation and agree to the recommended course of treatment immediately after a single report, but after a series of patient complaints, an investigation that produced numerous reports indicating possible alcohol abuse and receiving the report of an expert in the field, Feldman.

It scarcely needs stating that a doctor who is impaired by alcohol is a danger to patients and that Humana did not have to wait for Bekker to actually harm a patient before acting. *Watson v. City of Miami Beach*, 177 F.3d 932, 935 (11th Cir. 1999) (ADA does not require police department

to forego fitness for duty examination and wait until a perceived threat becomes real or questionable behavior results in injuries); *Palmer v. Circuit Court of Cook County, Illinois*, 117 F.3d 351, 352 (7th Cir. 1997) (requiring employer to retain a potentially violent employee would "place the employer on a razor's edge — in jeopardy of violating the [ADA] if it fired such an employee, yet in jeopardy of being deemed negligent if it retained him and he hurt someone."); *Altman v. New York City Health and Hospitals Corp.*, 903 F. Supp. 503 (S.D. N.Y. 1995), *aff'd*, 100 F.3d 1054 (2d Cir. 1996), (upholding hospital's refusal to reinstate a physician to the position of Chief of its Department of Internal Medicine even after he had completed an in-patient alcoholism treatment program and was in a recovery program because of the harm he might cause if, either during or immediately after a period of heavy drinking, he made a command decision as to the proper course of treatment of a patient by other staff members).

Here, Humana responded appropriately to the compelling objective evidence that Bekker was seeing patients while under the influence of alcohol and required that Bekker undergo an evaluation and agree to whatever treatment might be recommended. Humana's actions were fully consistent with the decisions of this Court and entirely consonant with its obligations to its patients and under the ADA. *Senate Sergeant at Arms v. Senate Fair Employment Practices*, 95 F.3d 1102, 1107 (Fed. Cir. 1996) ("[P]rovision of a 'firm choice' between treatment and discipline is consistent with the statutory requirement of a reasonable accommodation of an individual with a disability. Treatment would seem to be essential to any accommodation for alcoholism. If an individual refuses treatment when offered, then discipline is appropriate."); *Williams v. Houston Lighting & Power Co.*,

980 F. Supp. 879, 883-84 (S.D. Tex. 1997) (holding that employer did not discriminate when it terminated nuclear power plant employee for refusing to sign agreement to submit to substance abuse monitoring program before returning to work).

No important issue is presented by Humana's actions which is appropriate for resolution by this Court. Indeed, Bekker's position would require employers to ignore objective evidence that an employee is a direct threat pending receipt of medical evidence and would invite protracted dispute and litigation over the adequacy of medical evidence obtained — all with potentially dire consequences to the employer, co-workers, customers and the public.

CONCLUSION

For all of these reasons, Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

MICHAEL G. CLEVELAND
Counsel of Record
RICHARD H. SCHNADIG
VEDDER, PRICE, KAUFMAN & KAMMHOLZ
222 N. LaSalle Street
Suite 2600
Chicago, Illinois 60601
(312) 609-7500

Attorneys for Respondent